UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION	MDL No. 2262 ECF Case Master File No. 1:11-md-2262-NRB **ORAL ARGUMENT REQUESTED**
THIS DOCUMENT RELATES TO: BAY AREA TOLL AUTHORITY, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants. CITY OF HOUSTON, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants. CITY OF PHILADELPHIA, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants. CITY OF RICHMOND, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants. CITY OF RIVERSIDE, *et al.*, Plaintiffs, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	 No. 14-cv-3094 No. 13-cv-5616 No. 13-cv-6020 No. 13-cv-0627 No. 13-cv-0597

COUNTY OF MENDOCINO, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 13-cv-8644
COUNTY OF SACRAMENTO, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 13-cv-5569
COUNTY OF SAN DIEGO, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 13-cv-0667
COUNTY OF SAN MATEO, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 13-cv-0625
COUNTY OF SONOMA, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 13-cv-5187
DARBY FINANCIAL PRODUCTS, *et al.*, Plaintiffs, v. BARCLAYS BANK PLC, *et al.*, Defendants.	No. 13-cv-8799
EAST BAY MUNICIPAL UTILITY DISTRICT, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 13-cv-0626

FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*, Plaintiffs, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 14-cv-1757
FEDERAL HOME LOAN MORTGAGE CORPORATION, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 13-cv-3952
FEDERAL NATIONAL MORTGAGE ASSOCIATION, Plaintiff, v. BARCLAYS BANK PLC, *et al.*, Defendants.	No. 13-cv-7720
MARAGOS, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 13-cv-2297
PRINCIPAL FINANCIAL GROUP, INC., *et al.*, Plaintiffs, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 13-cv-6014
PRINCIPAL FUNDS, INC., *et al.*, Plaintiffs, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 13-cv-6013

PRUDENTIAL INVESTMENT PORTFOLIOS 2, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 14-cv-4189
SALIX CAPITAL US INC., Plaintiff, v. BANC OF AMERICA SECURITIES LLC, *et al.*, Defendants.	No. 13-cv-4018
SAN DIEGO ASSOCIATION OF GOVERNMENTS, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 13-cv-5221
THE CHARLES SCHWAB CORPORATION, *et al.*, Plaintiffs, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 13-cv-7005
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Plaintiff, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 13-cv-5186
TRIAXX PRIME CDO 2006-1 LIMITED, *et al.*, Plaintiffs, v. BANK OF AMERICA CORPORATION, *et al.*, Defendants.	No. 14-cv-0146

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE
FRAUD AND RELATED CLAIMS IN THE DIRECT ACTIONS

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Defendants respectfully submit this memorandum of law in support of their motion to dismiss the fraud, aiding and abetting fraud, conspiracy to commit fraud, and negligent misrepresentation claims asserted by plaintiffs in the Direct Actions identified in Master Appendix Schedules D.1 and F.1 (the "Plaintiffs" and the "Fraud Actions," respectively),[1] under Rules 8(a), 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

Plaintiffs in the Fraud Actions are large, sophisticated investors that manage billions of dollars' worth of interest rate risk. They claim they were duped by Defendants into purchasing or holding an array of USD LIBOR-linked products throughout the financial crisis when panel bank Defendants allegedly made artificially low USD LIBOR submissions for reputational reasons and to reap profits from LIBOR-linked products. Plaintiffs allege no direct dealings with most of the Defendants, but assert a right to recover in fraud for alleged losses on transactions Defendants knew nothing about and in which they had no involvement. In effect, they assert that Defendants are liable to the world, that is, anyone who may have seen a published USD LIBOR rate and chosen to use it in a transaction of any sort. Not so. Plaintiffs' allegations of fraud, aiding and abetting, civil conspiracy and negligent misrepresentation are implausible and should be dismissed as a matter of law for several reasons.

First, the majority of their claims are untimely. Pointing to various articles, data and analyses that were widely publicized years ago, Plaintiffs argue that "rate manipulation" is "the only possible explanation" for USD LIBOR's alleged divergence from other supposed benchmarks. (*See, e.g.*, Regents ¶ 328.) Plaintiffs go so far as to argue that empirical data shows

[1] The CEMA action does not include fraud among its "claims for relief," but is included in Schedule D.1 because CEMA's allegations sound in fraud generally and, in describing the "nature of the action," CEMA purports to assert its claims "under theories" including "fraud." (CEMA ¶ 7.)

that panel bank Defendants artificially suppressed USD LIBOR "***more than 28.8%***" during the financial crisis period. (Phila. ¶ 210.) The data and articles upon which Plaintiffs rely to make these implausible arguments show that many of Plaintiffs' claims are untimely. Recognizing as much, Plaintiffs recycle allegations that a host of factors rendered Plaintiffs unable to identify Defendants' supposedly obvious fraud (*see, e.g.*, Prudential ¶¶ 297-340), but the Court has already rejected these arguments and held similar claims were time-barred. Applicable state laws require the same result here.

Second, Plaintiffs fail to adequately allege scienter as to each Defendant. Plaintiffs cannot state claims against Defendants with whom they did not transact ("Non-Transacting Defendants") because they do not allege facts sufficient to put themselves within a definable class of persons, as opposed to the public at large, whom the Non-Transacting Defendants intended or had particularized reason to expect were especially likely to rely on their USD LIBOR submissions or other supposed misrepresentations. Further, Plaintiffs' scattershot pleadings impermissibly lump together groups of Defendants and put forth a host of far-fetched theories unsupported by any factual allegations giving rise to a plausible inference of scienter.

Third, Plaintiffs fail to adequately allege reliance. Plaintiffs' generalized allegations that they received lower payments on financial products linked to USD LIBOR are not sufficient to show that Plaintiffs actually relied on any of Defendants' alleged misstatements. Moreover, the same data and articles upon which Plaintiffs rely that render their claims untimely also negate any inference of reasonable or justifiable reliance.

Fourth, Plaintiffs fail to adequately allege that Defendants made actionable false statements or omissions to them, directly or indirectly. No Plaintiff alleges the requisite fiduciary or confidential relationship required to assert claims of fraud by omission, and thus

claims based on Defendants' alleged omissions fail as a matter of law. Further, Plaintiffs assert a number of fraud claims that are impermissibly duplicative of their breach of contract claims.

Fifth, Plaintiffs fail to adequately allege damages with respect to many of their claims. For example, Plaintiffs allege no facts sufficient to show that Defendants' alleged conduct caused them to suffer losses on their investments in fixed-rate products or auction rate securities.

Sixth, Plaintiffs' aiding and abetting and civil conspiracy claims are inadequately pled. Certain Plaintiffs' aiding and abetting claims fail because governing state law does not recognize such a claim. Even as to jurisdictions that do, Plaintiffs fail to plead the requisite underlying tort, that any Defendant had "actual knowledge" of the alleged fraud, or that any Defendant provided "substantial assistance" in furtherance of other Defendants' alleged fraud. Plaintiffs' claims of conspiracy to commit fraud fail because Plaintiffs do not plead the requisite underlying tort, nor do they plausibly allege the existence of an agreement to defraud.

Seventh, Plaintiffs' negligent misrepresentation claims fail for many of the same reasons as their fraud claims and for the additional reason that Plaintiffs do not adequately allege the requisite duty of care to Defendants.

BACKGROUND

A. Plaintiffs' Theories of Fraud

Plaintiffs assert claims for common law fraud, negligent misrepresentation, aiding and abetting fraud, and conspiracy to commit fraud. The gravamen of their claims is that Defendants perpetrated a scheme to suppress USD LIBOR from August 2007 through at least May 2010,[2] and, in carrying out that scheme, made various misstatements and omissions. Specifically, Plaintiffs allege that Defendants (1) made false USD LIBOR submissions, (2) made false

[2] *See, e.g.*, Fannie Mae ¶ 4; Freddie Mac ¶ 7; Phila. ¶ 11; Principal Fin. ¶ 2; Prudential ¶ 3; Regents ¶ 6; Salix ¶ 3.

implicit representations regarding the integrity of USD LIBOR submissions and the competitiveness of the USD LIBOR setting process, and (3) failed to inform Plaintiffs and the public of their alleged misconduct.[3]

Plaintiffs generally submit that they were induced to enter into (and some Plaintiffs allege they were induced to hold or trade) LIBOR-linked transactions by Defendants' alleged false statements and omissions and that artificial USD LIBOR suppression reduced Plaintiffs' returns on their investments.[4] But most of these Plaintiffs had no direct dealings with Non-Transacting Defendants. When a Plaintiff does allege some sort of transactional relationship with a Defendant ("Transacting Defendant"), it usually involves an interest rate swap transaction. The Amended Complaints allege that, prior to and during the relevant period, Plaintiffs entered into and performed under interest-rate swap transactions with certain counterparty Defendants ("Contracting Defendants") and other unnamed entities governed by a standardized umbrella agreement ("Master Agreement") promulgated by the International Swaps and Derivatives Association, Inc. ("ISDA"), pursuant to which Plaintiffs received payments referenced to USD LIBOR.[5] In addition, certain Plaintiffs allege that they purchased or issued other specifically identified instruments, such as mortgage-backed securities ("MBS") and floating-rate notes, pursuant to which they received payments referenced to LIBOR.[6] All Plaintiffs allege that panel bank Defendants' false submissions artificially lowered USD LIBOR, reducing the payments to

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[3] *See, e.g.*, FDIC ¶¶ 288-91, 293-94, 297-301, 322-24, 327, 331-35.

[4] *See, e.g.*, FDIC ¶¶ 290, 295, 339; Freddie Mac ¶¶ 284, 289, 299; Houston ¶ 458; Phila. ¶¶ 441-43; Principal Fin. ¶ 233; Prudential ¶ 381; Regents ¶ 569; Schwab ¶¶ 315-16.

[5] *See, e.g.*, Fannie Mae ¶ 38; Regents ¶¶ 401-506; Salix ¶ 282.

[6] *See, e.g.*, FDIC ¶¶ 400, 420, 438; Schwab ¶¶ 277, 282, 284, 288, 290, 292, 294, 296, 299; Freddie Mac ¶¶ 9-10, 134; Fannie Mae ¶¶ 3, 10, 38; Principal Fin. ¶ 3; Principal Funds ¶ 3; Prudential ¶¶ 6, 250; Regents ¶¶ 402-03, 408-11; Triaxx ¶¶ 9, 134-35.

which Plaintiffs allegedly were entitled, which supposedly led to Plaintiffs posting additional collateral and terminating transactions at inflated fees.[7]

Plaintiffs also accuse Defendants of aiding and abetting the alleged fraud of other Defendants, including by suppressing USD LIBOR submissions and omitting to disclose the suppression.[8] Plaintiffs contend that Defendants took these actions in furtherance of a conspiracy by express or tacit agreement, which, they incorrectly allege, is evidenced by settlement agreements resolving government investigations.[9]

B. The LIBOR-Related Information and Data Relied Upon by Plaintiffs To Allege Their Fraud Claims Were Publicly Available During the Financial Crisis

Some Plaintiffs assert they were unaware of and not on inquiry notice of their claims until UBS's March 15, 2011 announcement that it was being investigated by various governmental agencies. (*See, e.g.*, Fannie Mae ¶ 91.) Other Plaintiffs go further, arguing that they were not on notice of their claims "until the recent revelations" contained in government settlements made public in 2012 and 2013. (*See, e.g.*, Regents ¶ 520.) This Court has twice ruled otherwise. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR I*"), 935 F. Supp. 2d 666, 704-05 (S.D.N.Y. 2013); *In re LIBOR-Based Fin. Instruments Antitrust Litig.* ("*LIBOR III*"), 2014 WL 2815645, at *16, *19 (S.D.N.Y. June 23, 2014). Indeed, as others have before them, Plaintiffs undercut their pleas of justifiable ignorance by basing their claims on

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[7] *See, e.g.*, FDIC ¶ 341; Freddie Mac ¶ 301; Maragos ¶ 87; Salix ¶ 507. In addition, Houston, while generally alleging harm from alleged persistent suppression, simultaneously alleges harm from sporadic ***inflation*** of LIBOR in connection with certain auction rate securities. (*See* Houston ¶¶ 395, 413.) Schwab also alleges harm to ***fixed-rate*** instruments it held that were ***not referenced to LIBOR***. (*See* Schwab ¶ 270.) Furthermore, Salix attempts to connect alleged LIBOR manipulation to lower management and incentive fees received by investment advisors. (*See* Salix ¶¶ 290-94, 487, 497.)

[8] *See, e.g.*, Darby ¶¶ 454-58; Fannie Mae ¶¶ 143-47; Regents ¶¶ 572-76; Darby ¶¶ 454-58; Hous. ¶¶ 461-65; Regents ¶¶ 572-76; Triaxx ¶¶ 172-76.

[9] *See, e.g.*, Fannie Mae ¶¶ 151-58; Schwab ¶¶ 301-03; Triaxx ¶¶ 163-65.

articles and data that was publicly available at the same time Defendants were supposedly perpetrating their fraud. Plaintiffs never explain why the supposedly clear and convincing evidence of fraud that has existed for years was unavailable to them or once appeared equivocal.

Plaintiffs allege two motives for panel bank Defendants' alleged suppression of LIBOR: (i) to "avoid negative publicity . . . about their liquidity and creditworthiness" and "to appear financially strong" (*see, e.g.*, Prudential ¶¶ 159-62), and (ii) to "pay[] lower interest rates on LIBOR-based financial instruments they sold to investors" (*see, e.g.*, Regents ¶ 95). These allegations are not based upon newly revealed facts. Plaintiffs support their first theory of motive by citing to a widely publicized April 10, 2008 report published by Citigroup Global Markets, which states that "the most obvious explanation for LIBOR being set so low is the prevailing fear of being perceived as a weak hand in this fragile market environment." (*See, e.g.*, Regents ¶ 101.) Similarly, Plaintiffs support their second theory of motive by citing public reports made during the financial crisis period stating that certain panel bank Defendants would profit from lower interest rates. (*See, e.g.*, Freddie Mac ¶ 89; Prudential ¶¶ 155-58; Regents ¶¶ 95-96.)

Plaintiffs also assert that several movements in USD LIBOR and patterns in USD LIBOR submissions show that USD LIBOR was manipulated. Specifically, several complaints allege that, at the outset of the financial crisis in early August 2007, the panel bank Defendants' USD LIBOR submissions jumped upwards and diverged from each other, "but then showed significant uniformity by the end of the month . . . consistent with allegations that the Bank Defendants began colluding." (*See, e.g.*, Freddie Mac ¶ 92.) Plaintiffs assert that, once this supposed collusion began, five panel banks all made USD LIBOR submissions that were simply too low to be believed based on contemporaneous public reports. (*See, e.g.*, Schwab ¶¶ 128-38.)

Plaintiffs also allege that a suspicious upward movement in USD LIBOR submissions occurred on April 18, 2008, after the British Bankers' Association ("BBA") announced that it was going to "conduct a review of the Libor-setting process." (*See, e.g.*, Fannie Mae ¶ 93.) Plaintiffs claim that this increase in USD LIBOR "could not have occurred, from a statistical perspective, without concerted effort by the LIBOR member banks." (*See, e.g.*, Regents ¶ 513.) Similarly, Plaintiffs allege that so-called "cross-currency rank reversals"—differences in LIBOR submissions made in different currencies—"can only be explained by intentional manipulation of LIBOR" because a bank's "credit risk is the same for loans in either currency." (*See, e.g.*, Regents ¶ 360 (internal quotation marks omitted).) Though Plaintiffs were allegedly relying on LIBOR throughout the financial crisis period, Plaintiffs do not explain why these rank reversals and other movements in USD LIBOR submissions, which they now say defied common sense and basic economics, failed to place them on notice of alleged artificial LIBOR suppression years ago.

Further, Plaintiffs allege that LIBOR significantly deviated from multiple purported benchmarks of borrowing costs and credit risk in a manner that was "extremely unusual" and "not plausibly achievable absent wrongful conduct and collusion among Panel Bank Defendants." (*See, e.g.*, BATA ¶¶ 51-111.) For example, Plaintiffs assert that "analysis" of the spread between USD LIBOR and the Eurodollar Deposit Rate (the "Eurodollar Spread"), using "well accepted statistical methodologies[,] strongly supports that suppression of USD LIBOR occurred." (*See, e.g.*, Schwab ¶ 99.) Though Plaintiffs assert that the Eurodollar Spread shows that USD LIBOR was grossly understated (*see, e.g.*, Fannie Mae ¶ 66), they also contend that the spread might not capture the full extent of Defendants' alleged LIBOR suppression (BATA ¶ 69 n.31; Schwab ¶ 85 n.34). Similarly, relying on a methodology popularized in a May 29, 2008

Wall Street Journal article, Plaintiffs assert that discrepancies between credit default swap prices and LIBOR submissions "contravene[] basic rules of economics and finance." (*See, e.g.*, Regents ¶¶ 347-59; *see also* Prudential ¶¶ 182-93.) Citing *Wall Street Journal* articles published on April 16, 2008 and September 22, 2008, Plaintiffs advance similar allegations regarding divergences between USD LIBOR and the rate paid for secured funds at the Federal Reserve's Term Auction Facility ("TAF"), which "would make no economic sense if the reported LIBOR was accurate." (*See, e.g.*, Regents ¶¶ 367-69; *see also* Schwab ¶¶ 125-26; Darby ¶¶ 218-20.) But Plaintiffs never explain why, as sophisticated investors, such information, all of which was publicly available, did not place them on notice of Defendants' alleged fraud at the time.

C. Reports Questioning USD LIBOR During the Financial Crisis Placed Plaintiffs on Notice of Their Claims

After the onset of the financial crisis in the fall of 2007, several of the world's most widely read news sources published reports that questioned USD LIBOR. As the financial crisis deepened, concerns grew that USD LIBOR panel banks were making artificially low LIBOR submissions to avoid "tip[ping] off the market that they're desperate for cash."[10]

The barrage of media reports questioning USD LIBOR became impossible to ignore in the spring of 2008. On April 10, 2008, Citibank strategists published a report entitled "Special Topic: Is LIBOR Broken?" which compared LIBOR to other supposed benchmarks, including the Eurodollar Deposit Rate, and found that "[three-month] LIBOR probably understates the real interbank lending costs by 20-30 [basis points]."[11] This report "brought widespread attention to

[10] *See* Ex. J to the Declaration of Matthew J. Porpora, dated November 5, 2014 ("Porpora Decl.") (Carrick Mollenkamp, *Libor Fog: Bankers Cast Doubt on Key Rate Amid Crisis*, Wall St. J., Apr. 16, 2008). (All exhibits referenced herein are exhibits to the Porpora Decl. and are hereinafter cited as "Ex. [X]").

[11] *See* Ex. B (Scott Peng, Chintan Gandhi & Alexander Tyo, *Special Topic: Is LIBOR Broken?*, Citigroup Research Report, Apr. 10, 2008).

the possibility [that LIBOR] might be understating actual bank lending costs."[12] On April 16, 2008, several of the world's most prominent news outlets—including the *Wall Street Journal*, Bloomberg, and the *Financial Times*—published a series of articles questioning USD LIBOR.[13] For example, the *Wall Street Journal* overviewed "concerns that . . . Libor[] is becoming unreliable,"[14] and the *Financial Times* reported that the BBA had threatened to ban banks from the LIBOR panel if they were caught making false submissions.[15] This first wave of reports was quickly followed by reports noting a "sudden jump" in USD LIBOR that reportedly represented "a sign that banks could be responding to increasing concerns that the rate doesn't reflect their actual borrowing costs."[16]

The news coverage of concerns about USD LIBOR continued unabated in the weeks that followed. For example, on May 29, 2008, the *Wall Street Journal* published a statistical analysis purporting to show that the cost of default insurance for USD LIBOR panel banks had diverged from their reported USD LIBOR submissions and, in the opinion of one expert, "show[ed] 'very convincingly' that reported Libor rates are lower than what the market thinks they should be."[17] Though the BBA announced it would take action regarding LIBOR, these efforts were repeatedly

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[12] *See* Ex. X (Liz Capo McCormick, *Citigroup's Head of Rates Strategy, Scott Peng, Leaves Firm*, Bloomberg.com, May 18, 2009).

[13] *See* Exs. C-J (Gillian Tett, *Lenders examine Libor alternatives*, Fin. Times, Apr. 16, 2008; Ben Livesey, *Bankers Group Reviews Libor Amid Manipulation Concern*, Bloomberg, Apr. 16, 2008; Carrick Mollenkamp, *Finance markets on edge as trust in Libor wanes—Bankers and traders worry that key rate is being manipulated*, Dow Jones Int'l News, Apr. 16, 2008; Laurence Norman, *BBA Libor Review Will Look for Past Misquoting from Bks*, Bloomberg, Apr. 16, 2008; Laurence Norman, *BBA: Now Reviewing Libor Setting Process*, Dow Jones Int'l News, Apr. 16, 2008; Laurence Norman, *BBA Will Act on Members Providing Misleading Libor Quotes,* Dow Jones Int'l News, Apr. 16, 2008; Yves Smith, *Stressed Banks Underreporting Libor Rates*, Naked Capitalism, Apr. 16, 2008; Carrick Mollenkamp, *Libor Fog: Banks Cast Doubt on Key Rate Amid Crisis*, Wall St. J., Apr. 16, 2008).

[14] *See* Ex. J (Carrick Mollenkamp, *Libor Fog: Banks Cast Doubt on Key Rate Amid Crisis*, Wall St. J., Apr. 16, 2008).

[15] *See* Ex. C (Gillian Tett, *Lenders examine Libor alternatives*, Fin. Times, Apr. 16, 2008).

[16] *See* Ex. L (Carrick Mollenkamp, *Libor Surges After Scrutiny Does, Too*, Wall St. J., Apr. 18, 2008).

[17] *See* Ex. Q (Carrick Mollenkamp & Mark Whitehouse, *Study Casts Doubt on Key Rate—WSJ Analysis Suggests Banks May Have Reported Flawed Interest Data for Libor*, Wall St. J., May 29, 2008).

criticized in the press as insufficient,[18] and the concerns regarding USD LIBOR persisted.[19] For instance, in September 2008, multiple articles suggested that LIBOR submissions likely were inaccurate, including a September 24, 2008 *Wall Street Journal* article that stated that "[t]he accuracy of [USD LIBOR], seen as critical to judging the health of the financial markets at a precarious time, is coming under question for the second time this year."[20] Further, in December 2008, Mervyn King, Governor of the Bank of England, was quoted in the *Financial Times* as joking that LIBOR was "in many ways the rate at which banks do not lend to each other, and it is not clear that it either should or does have significant operational content."[21]

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE WHOLLY OR PARTIALLY TIME-BARRED

A. Choice of Law for Statutes of Limitation Analyses

Defendants seek dismissal of the untimely claims in the Fraud Actions, which are comprised of actions originally filed in six different states. Applicable choice of law rules vary depending upon the state where each action was originally filed. Accordingly, Section I.A.1. below explains the choice of law analysis applicable to the relevant Fraud Actions originally filed in New York; Section I.A.2. explains the analysis for relevant Fraud Actions originally filed in other forums. For the convenience of the Court, Master Appendix Schedules D.2, D.3, F.2

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[18] *See, e.g.*, Ex. T (Adam Bradbery, *Libor Revamp Is Urged by Money-Market Group*, Wall St. J., Jul. 11, 2008).

[19] *See, e.g.*, Ex. S (Adam Bradbery, *Mkt Participants Doubt Libor Rates Reflect Mkt Rates—Survey*, Dow Jones Int'l News, June 19, 2008) (reporting that a poll of market participants indicated that 82% of respondents either agreed or strongly agreed with the statement that LIBOR did not reflect true market conditions).

[20] *See* Ex. U (Carrick Mollenkamp, *Libor's Accuracy Becomes Issue Again—Questions on Reliability of Interest Rate Rise Amid Central Banks' Liquidity Push*, Wall St. J., Sept. 24, 2008); Ex. V (Michael Mackenzie & Aline van Duyn, *Money market freeze intensifies*, Fin. Times, Sept. 26, 2008) ("Traders say the virtual cessation of lending means interbank funding rates no longer accurately reflect the true cost of raising money.").

[21] *See* Ex. W (Charles Giles, *Real borrowing costs remain high*, Fin. Times, Dec. 4, 2008).

and F.3 set forth the results of this analysis and identify the statutes of limitation governing each of Plaintiffs' fraud and negligent misrepresentation claims.

1. New York Choice of Law Rules Govern the Timeliness of Claims Filed in New York

New York choice of law rules determine the statute of limitations applicable to the actions filed in New York by Darby, Fannie Mae, FDIC, Salix and Triaxx.[22] "Where a nonresident brings a cause of action which accrued outside of New York," N.Y. C.P.L.R. § 202 applies and "the reviewing Court must apply the shorter limitation period, including all relevant tolling provisions, of either: (1) New York; or (2) the state where the cause of action accrued." *Robb Evans & Assocs. LLC v. Sun Am. Life Ins. Co.*, 2012 WL 488257, at *2 (S.D.N.Y. Feb. 14, 2012) (internal quotation marks omitted). For the purposes of N.Y. C.P.L.R. § 202, a cause of action alleging economic injury accrues "where the plaintiff resides and sustains the economic impact of the loss." *Global Fin. Corp. v. Triarc Corp.*, 715 N.E.2d 482, 485 (N.Y. 1999).

For the purposes of N.Y. C.P.L.R. § 202, "a business's principal place of business constitutes the sole residency of that business entity." *Woori Bank v. Merrill Lynch*, 923 F. Supp. 2d 491, 495 (S.D.N.Y. 2013). Thus, Fannie Mae resides in the District of Columbia (Fannie Mae ¶¶ 12, 15), and Triaxx resides in New York (Triaxx ¶ 14). Further, because a partnership like Darby resides in its principal place of business, *BPP Ill., LLC v. Royal Bank of Scotland Grp., PLC*, 2013 WL 6003701, at *5 (S.D.N.Y. Nov. 13, 2013), Darby resides in

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[22] "In cases where jurisdiction is based on diversity, a federal court will apply the choice-of-law rules of the forum state." *Chiste v. Hotels.com L.P.*, 756 F. Supp. 2d 382, 408 (S.D.N.Y. 2010) (internal quotation marks omitted). Similarly, when addressing state law claims in federal question cases, courts in the Second Circuit apply New York choice of law rules "where no significant federal policy, calling for the imposition of a federal conflicts rule, exists." *See Klein v. ATP Flight School, LLP*, 2014 WL 3013294, at *5 n.3 (S.D.N.Y. July 3, 2014) (quoting *Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 607 (2d Cir. 2001)); *see also Lloyds Bank PLC v. Republic of Ecuador*, 1998 WL 118170, at *6 (S.D.N.Y. Mar. 16, 1998).

Pennsylvania (Darby ¶ 18). The analysis is similar for *Salix*;[23] the statute of limitations applicable to the claims that it asserts on behalf of FrontPoint entity must be determined by reference to Connecticut law because the "principal place of business" of each of the FrontPoint entities was Connecticut. (Salix ¶ 18(a)-(d).) Because the statutes of limitations applicable to fraud and negligent misrepresentation claims in the District of Columbia, Pennsylvania and Connecticut are shorter than those of New York,[24] these statutes of limitations control the claims filed in New York by the residents of those jurisdictions.

N.Y. C.P.L.R. § 202 and the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") control the claims filed by the FDIC. FIRREA provides that the FDIC may assert a claim if it is timely under the longer of (1) a three-year period provided for by statute, or (2) the limitations period available under applicable state law. 12 U.S.C. § 1821(d)(14)(A)(ii). These potential limitations periods run from the later of (1) the date on which the claim accrues, or (2) the date on which the FDIC was appointed conservator.[25] 12 U.S.C. § 1821(d)(14)(B). Because "[t]he residence of a plaintiff in receivership is that of the underlying business entity," *Robb Evans*, 2012 WL 488257, at *3, the relevant state law

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[23] Salix "is not entitled to stand in a better position than that of its assignor[s]" so the borrowing statute looks to the residency of the assignor to determine the applicable statute of limitations. *Portfolio Recovery Assocs., LLC v. King*, 14 N.Y.3d 410, 416 (2010).

[24] In New York, the statute of limitations for fraud is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it." N.Y. C.P.L.R. § 213(8). Negligent misrepresentation similarly has a six-year statute of limitations. *See, e.g.*, *Gander Mountain Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351, 368 (N.D.N.Y. 2013). Under New York law, Plaintiffs' causes of action for civil conspiracy and aiding and abetting are timely only if their underlying fraud claims are timely (and they are not). *See US Bank Nat. Ass'n v. Gestetner*, 960 N.Y.S.2d 227, 229 n.2 (N.Y. App. Div. 2013); *Forbes v. Giacomo*, 2013 WL 5779704, at *4 (N.Y. Sup. Ct. Oct. 24, 2013) (aiding and abetting fraud).

[25] Fraud claims that expired within five years of the start of the conservatorship are revived by 12 U.S.C. § 1821(d)(14)(C), but this provision does not apply to negligent misrepresentation claims. *See W Holding Co. v. AIG Ins. Co.*, 2014 WL 3699383, at *4 (D.P.R. July 24, 2014); *F.D.I.C. v. Henderson*, 61 F.3d 421, 424 (5th Cir. 1995).

applicable to each of the FDIC's claims is that of the state in which each bank in receivership resided.

2. The Statutes of Limitations from the States Where Plaintiffs Filed Suit Apply to the Transferred Actions

BATA, CEMA, Freddie Mac, Philadelphia, Principal Financial, Principal Funds, Prudential, Regents, and Schwab filed complaints in federal courts in other jurisdictions; the Judicial Panel on Multidistrict Litigation transferred those actions to this Court. In a multidistrict litigation, the transferee court applies the choice of law rules of the transferor forum, *see, e.g.*, *Anschutz Corp. v. Merrill Lynch & Co., Inc.*, 690 F.3d 98, 112 (2d Cir. 2012), and its circuit's interpretation of federal law, *Menowitz v. Brown*, 991 F.2d 36, 40-41 (2d Cir. 1993).

Here, the transferor states can be split into two groups: (1) Virginia (Freddie Mac), Iowa (Principal Financial and Principal Funds), Ohio (CEMA)[26] and Pennsylvania (Philadelphia) consider limitations issues to be strictly procedural and apply their own statutes of limitations or their borrowing statutes;[27] and (2) California (BATA, Regents, Schwab)[28] and New Jersey

[26] As explained in footnote 1 above, the CEMA complaint purports to bring claims "under theories" including "fraud." (CEMA ¶ 7.) All of CEMA's claims sounding in fraud are time-barred under Ohio's 4-year statute of limitations. Oh. Rev. Code § 2305.09(C); *see also Hambleton v. R.G. Barry Corp.*, 465 N.E.2d 1298, 1302 (Ohio 1984) (in determining the applicable limitations period, "[t]he grounds for bringing the action are the determinative factors, the form is immaterial").

[27] *See Riker-Vanholland v. Transouth Fin. Corp.*, 2004 WL 1083260, at *3 (N.D. Iowa May 7, 2004); *Arandell Corp. v. Am. Elec. Power Co.*, 2010 WL 3667004, at *4 (S.D. Ohio Sept. 15, 2010); *Aamco Transmissions, Inc. v. Harris*, 759 F. Supp. 1141, 1143-44 (E.D. Pa. 1991); *Frankentek Residential Sys., LLC v. Buerger*, 2014 WL 1623775, at *4 (E.D. Pa. Apr. 24, 2014); *Demetriades v. Bryant*, 389 F. App'x 249, 250 (4th Cir. 2010). Principal Financial and Principal Funds are now purportedly "asserting claims under New York state law." (Principal Fin. ¶ 8; *accord* Principal Funds ¶ 8.) This does not alter the statute of limitations applicable to their claims because N.Y. C.P.L.R. § 202 requires application of Iowa's five-year statute of limitations to the claims asserted by the Principal Plaintiffs.

[28] Certain Schwab Plaintiffs not based in California—Charles Schwab Bank, N.A. (Nevada; Schwab ¶ 26), Schwab Short-Term Bond Market Fund, Schwab Total Bond Market Fund and Schwab YieldPlus Fund (Massachusetts; Schwab ¶¶ 28-29; 37)—must be timely under their respective home jurisdictions, pursuant to Cal. Civ. Proc. Code § 361, as well as under California's statute of limitations, pursuant to California's choice of law analysis. *See, e.g.*, *Gonzales v. Texaco, Inc.*, 2007 WL 4044319, at *4 (N.D. Cal. Nov. 15, 2007); *Tibbetts By & Through Tibbetts v. Syntex Corp.*, 1993 WL 241567, at *1 (9th Cir. 1993) (noting that this comparative analysis includes applicable tolling doctrines). The claims of these Schwab Plaintiffs are untimely under both California and Nevada or

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(Prudential) use an interest analysis or a borrowing statute to determine whether another state's statute of limitations should apply, although the forum state's statute of limitations is typically preferred.[29] Most of the Plaintiffs in the actions filed in California, Iowa and New Jersey allege injury in the forums in which they brought suit. Therefore, relevant choice of law rules dictate that the transferor forum's statute of limitations applies.[30]

B. Fraud Claims Are Time-Barred Because Plaintiffs Were on Notice of Their Claims No Later Than May 2008

The fraud claims asserted by BATA, Darby, Freddie Mac, Philadelphia, and Salix (on behalf of the FrontPoint entities)—as well as many of the FDIC's fraud claims—are wholly barred by applicable statutes of limitations because Plaintiffs were on notice of their claims by at least May 2008. Further, other Plaintiffs' claims are at least partially barred by applicable statutes of limitations or repose.

When this Court held that the Exchange-Based Plaintiffs were on notice of their LIBOR-related claims "no later than May 29, 2008," it did not have occasion to determine the earliest date on which a reasonable investor would have been on notice of a "probability" of LIBOR manipulation. *LIBOR I*, 935 F. Supp. 2d at 700, 710. While numerous allegations in Plaintiffs' complaints show that they were on notice of their claims at an earlier date, the Court need only

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Massachusetts law. *See* Cal. Civ. Proc. Code § 338(d) (three years); Nev. Rev. Stat. § 11.190(3)(d) (three years); M.G.L.A. 260, § 2A (three years).

[29] California applies a governmental interest analysis. *See, e.g.*, *Carlton v. Hertz Corp*., 2013 WL 394894, at *2-4 (C.D. Cal. Jan. 28, 2013). New Jersey applies the significant interest analysis in the Restatement (Second) of Conflict of Laws. *See, e.g.*, *TekDoc Servs., LLC v. 3i-Infotech Inc.*, 2013 WL 2182565, at *12-13 (D.N.J. May 20, 2013).

[30] *See, e.g.*, *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 593-94 (9th Cir. 2012) (holding that the state where the last event necessary to make the actor liable had occurred had the predominant interest in having its law applied); *Deutsch v. Turner Corp.*, 317 F.3d 1005, 1028 (9th Cir. 2003) ("the governmental interest approach generally leads California courts to apply California law"); *Goodman v. Goldman, Sachs & Co*., 2010 WL 5186180, at *7 (D.N.J. Dec. 14, 2010) ("Plaintiff's residence (or domicile) is an important contact favoring application of New Jersey law").

find that all Plaintiffs were on inquiry notice before May 19, 2008 in order to dispose of the fraud claims that benefit from the longest relevant statute of limitations. (*See* Schedule D.2.) Ample record evidence shows this to be the case.

Based on the facts set forth in *LIBOR I* and other public reports of which the Court may take notice, it is apparent that Plaintiffs were on notice of their claims by no later than May 16, 2008. *LIBOR I*, 935 F. Supp. 2d 700-03 (collecting articles published before May 16, 2008). As early as January 2008, a publication reported concerns that "Libor has now become a low-ball estimate of the cost of funds" and that "Libor is consistently underestimating the funding costs."[31] By April 10, 2008, a report issued by Scott Peng and other Citigroup strategists entitled, "Special Topic: Is LIBOR Broken?" reportedly "brought wide-spread attention to the possibility [that LIBOR] might be understating actual bank lending costs." *LIBOR I*, 935 F. Supp. 2d at 701 (citations and internal quotation marks omitted). Between April 10 and May 16, 2008, 14 reports were published discussing concerns regarding USD LIBOR, including articles published by major financial outlets such as Bloomberg, the *Financial Times*, and the *Wall Street Journal*. (Exs. C-P.) These articles publicized the very same alleged deviations between USD LIBOR and the Eurodollar Deposit Rate and the TAF on which Plaintiffs' complaints now rely. (Exs. E, J) As a result, they demonstrate that Plaintiffs had ample notice of their claims by late April 2008 or at least by May 16, 2008.

Moreover, the Court's previous statute of limitations rulings in *LIBOR I* and *LIBOR III* are controlling here. *See, e.g.*, *BPP*, 2013 WL 6003701, at *10-11 (applying Pennsylvania law). Under relevant state law, "a plaintiff need not be on notice of all the facts necessary to plead its

[31] Ex. A (Duncan Wood, *Libor's true colors*, Risk Magazine, Jan. 1, 2008).

claim to trigger the statute of limitations."[32] Indeed, no state permits plaintiffs to turn a blind eye to allegedly obvious signs of fraud.[33] Accordingly, the statute of limitations applicable to Plaintiffs' fraud claims began to run by at least May 16, 2008 when the news reports and other publicly available data alleged in Plaintiffs' complaints were sufficient to put a reasonable person on notice of a "probability" of injury from alleged LIBOR manipulation.[34]

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[32] *BPP*, 2013 WL 6003701, at *11; *see also Hamilton Materials Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007) (under California law it is "not necessary" for plaintiff to have "notice of [defendants'] specific intention to deceive before [a] fraud action accrue[s]"); *Hu v. George Wash. Univ*., 766 F. Supp. 2d 236, 244 (D.D.C. 2011) ("[A] right of action may accrue before the plaintiff becomes aware of all the relevant facts."); *Hallett Const. Co. v. Meister*, 713 N.W.2d 225, 231 (Iowa 2006) ("A claimant can be on inquiry notice without knowing the details of the evidence by which to prove the cause of action."); *Hutton v. Deutsche Bank AG*, 541 F. Supp. 2d 1166, 1170 (D. Kan. 2008); *Blessing v. Johnson & Johnson*, 2010 WL 772211, at *2 (N.J. Super. Ct. App. Div. Mar. 5, 2010) ("[A]ll that is required is that the person be aware of facts which suggest the 'possibility' of wrongdoing."); *Cundall v. U.S. Bank*, 909 N.E.2d 1244, 1250 (Ohio 2009) (Ohio "does not require the victim of the alleged fraud to possess concrete and detailed knowledge, down to the exact penny of damages, of the alleged fraud; rather, the standard requires only facts sufficient to alert a reasonable person of the *possibility* of fraud."); *Estate of Ayala v. Philip Morris, Inc.*, 263 F. Supp. 2d 311, 320 (D.P.R. 2003); *Malik v. ConocoPhillips Co*., 2014 WL 3420775, at *3 (E.D. Tex. June 23, 2014) (Delayed discovery tolls the statute of limitations only where the injury is "inherently undiscoverable"); *Schmidt v. Household Fin. Corp., II*, 661 S.E.2d 834, 840 (Va. 2008) (fraud claim was time-barred because circumstances were sufficient to cause a "reasonable and prudent person [to] suspect that something was amiss").

[33] *See, e.g*., *Hendel v. World Plan Exec. Council*, 705 A.2d 656, 661 (D.C. 1997) (inquiry notice arose because defendants allegedly "made representations which any reasonable person would recognize as being contrary to human experience, and indeed, to the laws of physics"); *see also Waldrup v. Hartford Life Ins. Co.*, 598 F. Supp. 2d 1219, 1229 (N.D. Ala. 2008) ("Alabama law is clear on the fact that 'if a party . . . closes his eye where ordinary diligence requires him to see, he is willingly deceived.'"); *GC Capital v. Deutsche Bank AG*, 2014 WL 1672567, at *7-8 (C.D. Cal. Apr. 28, 2014) (dismissing fraud claims because of contradictory allegations of falsity and inquiry notice in plaintiff's pleadings); *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 854 (Colo. App. 2007) (Colorado law does not "reward denial or self-induced ignorance."); *Cundall*, 909 N.E.2d at 1251 ("[T]he 'subterfuge' by [Defendant] was 'transparent' . . . and [Plaintiffs] knew or should have known" of their claims.); *Bauder v. Ralston Purina Co.*, 1989 WL 143283, at *5 (E.D. Pa. Nov. 22, 1989) ("[P]utative fraud victims may [not] proceed in blithe disregard of obvious indicia of fraud."); *Quintana Lopez v. Liggett Grp., Inc.*, 336 F. Supp. 2d 153, 157-58 (D.P.R. 2004) ("[D]ue diligence does not mean waiting for answers to fall from the sky," particularly in light of "widespread knowledge."); *Va. Imports, Inc. v. Kirin Brewery of Am., LLC*, 296 F. Supp. 2d 691, 701 (E.D. Va. 2003) ("[Plaintiff] should have know[n] what 'everyone else' knew . . . [and that] triggered [Plaintiff's] requirement to perform due diligence . . . .").

[34] *Compare LIBOR I*, 935 F. Supp. 2d at 698 ("Inquiry notice . . . gives rise to a duty of inquiry 'when the circumstances would suggest to an investor of ordinary intelligence the probability that she has been defrauded.'"), *with Stichting Pensioenfonds ABP v. Countrywide Fin. Corp*., 802 F. Supp. 2d 1125, 1140 (C.D. Cal. 2011) ("[D]iscovery . . . [occurs] when the plaintiff suspected or should have suspected that an injury was caused by wrongdoing."); *Martinez v. Affordable Hous. Network, Inc*., 123 P.3d 1201, 1207 (Colo. 2005); *Drake v. McNair*, 993 A.2d 607, 617 (D.C. 2010) ("Nevertheless, a party with immediate suspicions of wrongdoing has an 'obligation to move promptly and with reasonable diligence to inquire further into the matter.'"); *Union Planters, NA v. Fitzpatrick*, 2007 WL 911893, at *2 (Iowa Ct. App. Mar. 28, 2007) ("Once a fraud claimant learns information that would inform a reasonable person of the need to investigate, the claimant is on inquiry notice of all facts that would have been disclosed by a reasonably diligent investigation."); *Hutton v. Deutsche Bank AG*, 541 F. Supp. 2d 1166,

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Plaintiffs make no effort to deny that they had actual and constructive knowledge of the myriad of facts alleged in their complaints that this Court has already held sufficient to put any reasonable person on notice of a probability of injury from alleged LIBOR manipulation. For example, Plaintiffs cannot deny knowledge of the allegedly suspicious movements in LIBOR submissions that supposedly "could not have occurred . . . without concerted effort by the LIBOR member banks" and "can only be explained by intentional manipulation of LIBOR" (Regents ¶¶ 513, 360 (discussing the upward movement of USD LIBOR on April 18, 2008 and cross-currency rank reversals).) Even if this kind of market data were insufficient to show that Plaintiffs were on notice of their claims, Plaintiffs' complaints cite to many of the same news articles that this Court has already held sufficient to place any reasonable investor on notice of a probability of alleged LIBOR manipulation. *LIBOR I*, 935 F. Supp. 2d at 700-05. These and other articles cited in Plaintiffs' complaints, as well as additional articles of which this Court may take notice (Exs. A-R), are more than sufficient to show that Plaintiffs' claims are time-barred because Plaintiffs were on inquiry notice of their claims in May 2008 and/or failed to diligently pursue them.[35]

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1169 (D. Kan. 2008); *Cundall*, 909 N.E.2d at 1250 (Ohio "does not require the victim of the alleged fraud to possess concrete and detailed knowledge, down to the exact penny of damages, of the alleged fraud; rather, the standard requires only facts sufficient to alert a reasonable person of the *possibility* of fraud."); *Passaic Valley Water Commc'n v. Prismatic Dev. Corp.*, 2013 WL 5508055, at *4-5 (N.J. Super. Ct. App. Div. Oct. 7, 2013) ("We impute discovery if the plaintiff is aware of facts that would alert a reasonable person to the *possibility* of an actionable claim."); *CHLSEA, LLC v. Gramercy Fin. Servs., LLC*, 2013 WL 6095110, at *6 (N.Y. Sup. Ct. Nov. 19, 2013) (holding that inquiry notice arises when "circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded"); *Estate of Ayala*, 263 F. Supp. 2d at 320 (requiring only "knowledge of the injury and the entity that likely caused it"); *Va. Imports, Inc.*, 296 F. Supp. 2d at 700 ("[Plaintiffs] are place [sic] on inquiry notice by 'evidence of the possibility of fraud, not by complete exposure of the alleged scam.'"); *Kheel v. Stone St. Capital Inc.*, 2006 WL 3054310, at *3 (E.D. Wash. Oct. 26, 2006) ("[T]he discovery rule . . . will not be applied where the Plaintiff has ready access to the information upon which the claim is asserted.").

35 *See, e.g.*, *Plumlee v. Pfizer, Inc.*, 2014 WL 695024, at *9 (N.D. Cal. Feb. 21, 2014); *Stichting Pensioenfonds ABP*, 802 F. Supp. 2d at 1136 & n.9; *Nader v. Democratic Nat. Comm.*, 567 F.3d 692, 700 (D.C. Cir. 2009); *Union Planters*, 2007 WL 911893, at *2; *Hutton v. Deutsche Bank AG*, 541 F. Supp. 2d 1166, 1170 (D. Kan. 2008); *Kan. Pub. Emps. Ret. Sys. v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, 114 F.3d 679, 689-90 (8th Cir.
(continued . . .)

C. Aiding and Abetting, Conspiracy and Negligent Misrepresentation Claims Are Also Time-Barred

Plaintiffs' aiding and abetting claims[36] are time-barred to the same extent as Plaintiffs' underlying fraud claims[37] and, in most jurisdictions, the statute of limitations for civil conspiracy is the same as that of the underlying fraud.[38] The negligent misrepresentation claims asserted by the FDIC, Principal Financial, Principal Funds, Prudential and Regents are also time-barred for the same reasons that the fraud claims are time-barred.[39]

D. Plaintiffs' Various Tolling Arguments Fail

Fraudulent Concealment. For two principal reasons, this Court's rulings foreclose Plaintiffs' assertions that applicable statute of limitations should be tolled due to Defendants' alleged fraudulent concealment. *See LIBOR I*, 935 F. Supp. 2d at 710-11. *First*, "[t]he

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1997) (Kansas law); *Blankenship v. Smith*, 1995 WL 470546, at *1 (Ohio Ct. App. Aug. 7, 1995); *Cnty. of Hudson v. Janiszewski*, 520 F. Supp. 2d 631, 642-43 (D.N.J. 2007); *BPP Ill., LLC v. Royal Bank of Scotland Grp., PLC*, 2013 WL 6003701, at *7 (S.D.N.Y. Nov. 13, 2013); *TMG II v. Price Waterhouse & Co.*, 572 N.Y.S.2d 6, 7 (N.Y. App. Div. 1991); *Rabassa Suarez v. Ford Motor Co.*, 204 F. Supp. 2d 302, 304 (D.P.R. 2002); *Bado-Santana v. Ford Motor Co.*, 283 F. Supp. 2d 520, 531-32 (D.P.R. 2003) ("media coverage" put plaintiffs on notice); *Prostok v. Browning*, 112 S.W.3d 876, 898 (Tex. App. 2003), *aff'd on different grounds,* 165 S.W.3d 336 (Tex. 2005); *Resolution Trust Corp. v. Walde*, 856 F. Supp. 281, 289 (E.D. Va. 1994); *Flick v. Wyeth LLC*, 2012 WL 4458181, at *3 (W.D. Va. June 6, 2012); *Allen v. State*, 826 P.2d 200, 203-04 (Wash. 1992).

[36] BATA ¶¶ 316-19; Darby ¶¶ 452-61; Fannie Mae ¶¶ 142-49; FDIC ¶¶ 308-12; Phila. ¶¶ 445-53; Principal Fin. ¶¶ 236-40; Principal Funds 234-38; Prudential ¶¶ 386-97; Regents ¶¶ 571-81; Salix ¶¶ 499-508; Schwab ¶¶ 322-325; Triaxx ¶¶ 171-78.

[37] *See, e.g.*, *River Colony Estates Gen. P'ship v. Bayview Fin. Trading Grp., Inc.,* 287 F. Supp. 2d 1213, 1220 (S.D. Cal. 2003); *Flannery v. Singer Asset Fin. Co.*, 94 A.3d 553, 567 n.23 (Conn. 2014); *Lifeblood Biomedical Inc., Opt-In Trust v. Mann (In re Sender)*, 423 F. Supp. 2d 1155, 1166 (D. Colo. 2006); *Dubois v. Wash. Mut. Bank*, 2010 WL 3463368, at *3 (D.D.C. Sept. 3, 2010); *Alfamodess Logistics, LLC v. Catalent Pharma Solutions, LLC*, 2014 WL 4545763, at *18 (E.D. Pa. Sept. 12, 2014); *NNN Siena Office Park I 2, LLC v. Wachovia Bank Nat'l Ass'n*, 2014 WL 4417858, at *6 (D. Nev. Sept. 8, 2014); *Cetel v. Kirwan Fin. Grp., Inc.*, 460 F.3d 494, 505 n.7 (3d Cir. 2006) (New Jersey law); *Forbes v. Giacomo*, 2013 WL 5779704, at *4 (N.Y. Sup. Ct. Oct. 24, 2013); *Thomas v. Barton Lodge II, Ltd.*, 174 F.3d 636, 647 (5th Cir. 1999) (Texas law).

[38] *See, e.g.*, *LaBow v. Rubin*, 897 A.2d 136, 145 (Conn. Ct. App. 2006); *Carlson v. Smith*, 1999 WL 989601, at *5 (Conn. Super. Ct. Oct. 19, 1999); *Hancock v. Homeq Servicing Corp*., 2007 WL 1238746, at *9 (D.D.C. Apr. 27, 2007); *Tammera v. Grossman*, 2010 WL 1372406, at *6 (D.N.J. Mar. 29, 2010); *Alfamodess Logistics, LLC v. Catalent Pharma Solutions, LLC*, 2014 WL 4545763, at *26 (E.D. Pa. Sept. 12, 2014).

[39] *See*, *e.g.*, *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 834 F. Supp. 2d 949, 961 (C.D. Cal. 2012); *John Q. Hammons Hotels, Inc. v. Acorn Window Sys., Inc.*, 394 F.3d 607, 610 (8th Cir. 2005) (Iowa law); *Carrier v. Bank of Am., N.A.*, 2014 WL 356219, at *11 (D.N.J. Jan. 31, 2014).

fraudulent concealment doctrine 'does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim,'" as Plaintiffs are here.[40] *Second*, Plaintiffs fail to allege adequately that they engaged in the kind of due diligence necessary to invoke the fraudulent concealment doctrine.[41] In fact, most Plaintiffs fail to allege *any* due diligence whatsoever.

American Pipe.[42] Despite what Plaintiffs claim,[43] the pendency of class actions in federal court does not toll the statute of limitations applicable to state law fraud claims because most states do not permit tolling based on membership in a class action filed in a different jurisdiction.[44] As a result, courts in the Second Circuit do not apply *American Pipe*-style tolling to state law claims unless the state in question has expressly adopted cross-jurisdictional

[40] *Snapp & Assocs. Ins. Servs., Inc. v. Robertson*, 117 Cal. Rptr. 2d 331, 335 (Cal. Ct. App. 2002); *see also Discover Bank v. Hill*, 94 A.3d 1287, 1292 (Conn. Super. Ct. 2012) ("There can be no concealment which will prevent the running of the statute of limitations where the cause of action is known to the plaintiff or there is a presumption of such knowledge."); *Nader v. Democratic Nat. Comm.*, 567 F.3d 692, 700 (D.C. Cir. 2009); *Garcia v. Eighth Judicial Dist. Court of State, ex rel. Cnty. of Clark*, 2011 WL 5903792, at *2 (Nev. Nov. 22, 2011); *Farmers Coop. Co. v. Swift Pork Co*., 602 F. Supp. 2d 1095, 1114 (N.D. Iowa 2009); *Sellens v. Am. States Ins. Co.*, 2004 WL 2160770, at *3 (Kan. Ct. App. Sept. 24, 2004); *Jacobson-Kirsch v. Kaforey*, 2012-Ohio-3553, at ¶ 12 (Ohio Ct. App. 2012); *Zemcik v. LaPine Truck Sales & Equip. Co.*, 706 N.E.2d 860, 865 (Ohio. Ct. App. 1998); *Trinity Church v. Lawson-Bell*, 925 A.2d 720, 729 (N.J. Super. Ct. App. Div. 2007); *Sarpolis v. Tereshko*, 2014 WL 2765088, at *8 (E.D. Pa. June 17, 2014); *Netto v. JPMorgan Chase Bank, NA*, 2007 WL 1729646, at *2 (S.D. Tex. June 13, 2007); *Lucas v. Henrico Cnty. Sch. Bd.*, 2012 WL 1665428, at *6 (E.D. Va. Apr. 12, 2012); *Vollstedt v. Tegman*, 2010 WL 1433484, at *2 (Wash. Ct. App. 2010).

[41] *See, e.g.*, *Sarpolis v. Tereshko*, 2014 WL 2765088, at *7 (E.D. Pa. June 17, 2014) ("[A] plaintiff must allege particularized facts sufficient to suggest . . . [that] the plaintiff's ignorance is not attributable to her lack of reasonable due diligence in attempting to uncover the relevant facts."); *see also Platt Elec. Supply, Inc. v. EOFF Elec., Inc*., 522 F.3d 1049, 1055 (9th Cir. 2008) (California law); *BDO Seidman, LLP v. Morgan, Lewis & Bockius LLP*, 89 A.3d 492, 501 (D.C. 2014); *Lindley v. F.D.I.C.*, 2012 WL 27576, at *6 (S.D. Ga. Jan. 4, 2012); *Schlote v. Dawson*, 676 N.W.2d 187, 195 (Iowa 2004); *Freebird, Inc. v. Merit Energy Co*., 883 F. Supp. 2d 1026, 1036 (D. Kan. 2012); *Villalobos v. Fava*, 775 A.2d 700, 708 (N.J. Super. Ct. App. Div. 2001); *Estate of Ayala v. Philip Morris, Inc.*, 263 F. Supp. 2d 311, 317-21 (D.P.R. 2003); *Doe v. Linam*, 225 F. Supp. 2d 731, 736 (S.D. Tex. 2002); *Giraud v. Quincy Farm & Chem.*, 6 P.3d 104, 111-12 (Wash. Ct. App. 2000).

[42] *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974) ("*American Pipe*").

[43] *See* BATA ¶ 249; Darby ¶¶ 379-84; Phila. ¶ 389-94; Principal Fin. ¶¶ 133-6; Principal Funds ¶ 131-34; Prudential ¶¶ 359-64; Regents ¶ 521; Salix ¶¶ 388-93; Schwab ¶ 265.

[44] *See, e.g.*, *Clemens v. DaimlerChrysler Corp*., 534 F.3d 1017, 1025 (9th Cir. 2008); *In re Bear Stearns Companies, Inc. Sec., Derivative, & ERISA Litig*., 995 F. Supp. 2d 291, 311 (S.D.N.Y. 2014).

tolling.[45] *See, e.g.*, *Bear Stearns*, 995 F. Supp. 2d at 312 (noting "compelling policy reasons" against cross-jurisdictional tolling). Of the transferor jurisdictions, only New Jersey and Ohio have adopted a form of cross-jurisdictional tolling, but it is inapplicable given the facts here.[46] Plaintiffs cannot invoke *American Pipe* tolling to toll the statute of limitations applicable to their claims.[47] Further, *American Pipe* is inapplicable to the claims asserted by Plaintiffs for the reasons set forth in Section III.D. of Defendants' Memorandum of Law in Support of the Motion to Dismiss the Tortious Interference Claims and equitable tolling does not apply to Schwab or any other Plaintiffs as set forth in Section II.D of Defendants' Motion to Dismiss Direct Action Plaintiffs' UCL and GBL Claims.

<u>*Continuing Violation*</u>. BATA, the Principal Plaintiffs, Regents, and Schwab assert that the alleged existence of a continuing violation should toll the applicable statute of limitations,[48] but under California and Iowa law the doctrine cannot save their untimely claims. Under California law, the continuing violation doctrine is inapplicable where, as here, Plaintiffs were on

[45] Courts discussing California, New York, Pennsylvania, and Virginia law have all explicitly rejected or refused to incorporate cross-jurisdictional tolling into the law of these states. *See Clemens*, 534 F.3d at 1025; *Bear Stearns*, 995 F. Supp. 2d at 311; *Ravitch v. Pricewaterhouse,* 793 A.2d 939, 942-43 (Pa. Super. Ct. 2002); *Casey v. Merck & Co.*, 722 S.E.2d 842, 846 (Va. 2012). Defendants are unaware of any opinions expressly discussing the applicability of cross-jurisdictional tolling in Connecticut, the District of Columbia, or Iowa.

[46] New Jersey and Ohio recognize cross-jurisdictional tolling but only where the *same claims* were raised in the original class action. *See Del Sontro v. Cendant Corp.,* 223 F. Supp. 2d 563, 581 (D.N.J. 2002); *Chancellor* v. *Coca-Cola Enters., Inc.*, 2008 WL 3307131, at *3 (S.D. Ohio Aug. 7, 2008). Plaintiffs themselves recognize that their New Jersey fraud claims were not raised in prior class actions. (*See* Prudential ¶ 360.) Further, under New Jersey and Ohio law, Plaintiffs cannot take advantage of *American Pipe*-style tolling if they filed their individual action before a decision on class certification. *Thomas v. Corr. Med. Servs., Inc.*, 2009 WL 737105, at *3-4 (D.N.J. Mar. 17, 2009); *Hubbard v. Corr. Med. Servs., Inc.*, 2008 WL 2945988, at *7-8 (D.N.J. July 30, 2008) (collecting cases); *Wyser-Pratte Mgmt. Co. v. Telxon Corp*., 413 F.3d 553, 568-69 (6th Cir. 2005); *Loyd v. Huntington Nat'l Bank*, 2009 WL 1767585, at *11 (N.D. Ohio June 18, 2009).

[47] California's equitable tolling doctrine is equally inapplicable. (*See* BATA ¶ 249; Schwab ¶ 265.) As explained in detail in Section II.B of Defendants' Memorandum of Law in Support of the Motion to Dismiss the UCL and GBL Claims, equitable tolling does not apply to Schwab due to its bad faith and voluntary dismissal of its claims. Similarly, BATA filed suit before class certification was denied and thus equitable tolling does not apply. *See Hendrix v. Novartis Pharm. Corp*., 975 F. Supp. 2d 1100, 1114-15 (C.D. Cal. 2013).

[48] *See* BATA ¶ 248; Principal Fin. ¶¶ 137-38; Principal Funds ¶¶ 135-36; Regents ¶ 523; Schwab ¶ 264.

notice of their injuries, *Allen v. Similasan Corp.*, 2013 WL 5436648, at *5 (S.D. Cal. Sept. 27, 2013), or when Plaintiffs' alleged harm was "not the result of small harms that may not have been actionable on their own," but was the result of allegedly "independently actionable act[s]." *DC Comics v. Pac. Pictures Corp.*, 938 F. Supp. 2d 941, 950 (C.D. Cal. 2013). Iowa law similarly makes clear that "[r]ecovery is limited to those actions accruing during the statutory period." *Hegg v. Hawkeye Tri-Cnty. REC*, 512 N.W.2d 558, 559-60 (Iowa 1994) (collecting cases). As a result, Plaintiffs cannot rely on the continuing violation doctrine to save their untimely claims.

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR FRAUD

In a multidistrict litigation, the court "applies the substantive state law, including choice of law rules, of the jurisdiction in which the action was filed."[49] In the relevant jurisdictions where the actions at issue were filed, where there is no conflict between potentially applicable laws, courts routinely apply the law of the forum state.[50] Although they may be formulated differently according to the particular jurisdiction, the essential elements of common law fraud are (1) a representation, (2) of a past or existing fact, (3) that was material, (4) and false; (5) the

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[49] *De George v. Am. Airlines, Inc.*, 338 F. App'x 15, 16 (2d Cir. 2009). Even in federal question cases, the Second Circuit applies state choice of law rules to supplemental state law claims where no "significant federal policy" is implicated. *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 491-92 (S.D.N.Y. 2001).

[50] *See, e.g.*, *Dornberger v. Metro. Life Ins. Co.*, 961 F. Supp. 506, 530 (S.D.N.Y. 1997); *accord Wash. Mut. Bank, FA v. Super. Ct.*, 15 P.3d 1071, 1080 (Cal. 2001); *Rowe v. Hoffman-La Roche, Inc.*, 917 A.2d 767, 771 (N.J. 2007); *Wendy's Int'l, Inc. v. Illinois Union Ins. Co.*, 2007 WL 710242, at *5 (S.D. Ohio Mar. 6, 2007); *Figueroa v. Williams*, 2010 WL 5387599, at *2 (S.D. Tex. Dec. 17, 2010); *Efessiou v. Efessiou*, 1996 WL 1065637, at *5 n.8 (Va. Cir. Ct. Nov. 12, 1996). Where a conflict exists, the law of the place where Plaintiffs allegedly sustained their injuries or relied on the alleged misrepresentation is generally controlling. *See, e.g.*, *Innovative BioDefense, Inc. v. VSP Technologies*, *Inc.*, 2013 WL 3389008, at *6 (S.D.N.Y. Jul. 3, 2013); *Grodzitsky v. Am. Honda Motor Co.*, 2014 WL 718431, at *7 (C.D. Cal. Feb. 19, 2014); *Curtiss-Wright Corp. v. Rodney Hunt Co.*, 1 F. Supp. 3d 277, 283-86 (D.N.J. 2014); *Sky Technologies Partners, LLC v. Midwest Research Inst.*, 125 F. Supp. 2d 286, 296-98 (S.D. Ohio 2000); *St. Gregory Cathedral Sch. v. LG Elec., Inc.*, 2014 WL 979196, at *5 (E.D. Tex. Mar. 5, 2014); *Sewraz v. First Liberty Ins. Corp.*, 2012 WL 12438, at *2 (E.D. Va. Jan. 3, 2012). Principal Financial and Principal Funds are now purportedly "asserting claims under New York state law." (Principal Fin. ¶ 8; *accord* Principal Funds ¶ 8.) Accordingly, Defendants have addressed their claims under New York law, even though they are equally deficient under Iowa law.

maker knew of or ignored its falsity, (6) and intended that the falsity be acted upon by plaintiff; and (7) plaintiff was ignorant of the falsity of the representation, (8) and reasonably relied on the falsity, (9) to plaintiff's detriment. *See, e.g.*, *Mandarin Trading Ltd. v. Wildenstein*, 944 N.E.2d 1104, 1108 (N.Y. 2011).

Rule 9(b) governs Plaintiffs' fraud claims. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."[51] Fed. R. Civ. P. 9(b). Thus, Plaintiffs must: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006); Fed. R. Civ. P. 9(b). Where, as here, multiple defendants must respond to allegations of fraud, Plaintiffs "must plead with particularity by setting forth separately the acts complained of by each defendant."[52]

Plaintiffs' fraud claims fail to comport with these fundamental pleading standards. Plaintiffs' shotgun pleadings aim fraud claims at a host of Defendants without regard to Rule 9(b) and the need to adequately allege scienter as to each Defendant. Indeed, Plaintiffs cannot state claims against Defendants with whom they did not transact because Plaintiffs allege no facts sufficient to show that any Plaintiff was within some definable, limited class of persons whom the Non-Transacting Defendants intended or had reason to expect were especially likely to rely on allegedly false USD LIBOR submissions or related representations.

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[51] "[I]n cases where, as here, the negligent misrepresentation claim is based on the same set of facts as those upon which a fraud claim is grounded, Rule 9(b) applies to the negligent misrepresentation claim as well." *Eaves v. Designs for Fin., Inc.*, 785 F. Supp. 2d 229, 254-55 (S.D.N.Y. 2011).

[52] *Sofi Classic S.A. de C.V. v. Hurowitz*, 444 F. Supp. 2d 231, 248 (S.D.N.Y. 2006); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993).

Further, no Plaintiff alleges particularized facts sufficient to show actual and justifiable reliance. Plaintiffs' generalized assertions that they relied on published USD LIBOR or USD LIBOR submissions are not sufficient to show actual reliance upon particular misstatements and are completely insufficient to show reasonable or justifiable reliance given the volume of information publicly available about supposed LIBOR manipulation.

Plaintiffs' pleadings are rife with additional deficiencies. Plaintiffs fail to adequately allege that certain statements were actionably false or misleading. Plaintiffs also fail to adequately allege damages with respect to many transactions.

A. Plaintiffs Fail to Adequately Allege Scienter

1. Plaintiffs Fail to Allege Scienter as to Non-Transacting Defendants

Plaintiffs allege in various ways that Defendants knew or should have known that the world at large looked to LIBOR as a "trustworthy benchmark" and that an indeterminate number of people could potentially incorporate LIBOR into their transactions.[53] Such allegations fail to adequately allege scienter.

A plaintiff cannot state a claim for fraud by asserting that her "reliance on a fraudulent misstatement was merely within the foresight of reasonable people."[54] In accordance with Sections 531 and 533 of the Restatement (Second) Torts, courts hold that no fraud claim can lie unless the defendant intended or had reason to expect that a person or determinate class of

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[53] *See, e.g.*, BATA ¶ 303 ("Defendants recognized the importance of USD LIBOR and falsely and publicly held it out as a trustworthy benchmark."); Schwab ¶ 316 ("Defendants recognized the importance of USD LIBOR and falsely and publicly held it out as a trustworthy benchmark. In doing so, Defendants intended for Plaintiffs and others to rely on Defendants' false representations of material fact.").

[54] *Gawara v. U.S. Brass Co.*, 74 Cal. Rptr. 2d 663, 668 n.10 (Cal. Ct. App. 1998) (citation and internal quotation marks omitted); *accord In re Windsor Plumbing Supply Co., Inc.*, 170 B.R. 503, 529 (E.D.N.Y. 1994) (under New York law, "[t]he measure of liability is intention and expectation, and thus something stronger than mere foreseeability").

persons would act in reliance on an alleged misrepresentation.[55] Where plaintiffs fail to allege a relevant transactional relationship with a defendant, the scienter requirement has a "narrow scope" in order to "foreclose the potential for unlimited liability." *See Ernst & Young, LLP v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 580 (Tex. 2001). As explained by the Texas Supreme Court, "[t]he intent-to-induce reliance element of fraud is a focused inquiry, more akin to a rifle shot than a shotgun blast. Intent-to-induce reliance is not satisfied by evidence that a misrepresentation may be read in the future by some unknown member of the public or of a specific industry."[56]

Application of these principles to facts substantially similar to those at issue here shows that Plaintiffs' claims against Non-Transacting Defendants should be dismissed. In *Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.*, plaintiff, an energy trading company, sought leave to amend its pleadings to assert a fraud claim against an energy company that reported artificially suppressed prices to an industry publication that published a natural gas price index. 786 F. Supp. 2d 1202, 1205 (S.D. Tex. 2009). In that case, plaintiff asserted that defendant had intent to defraud because it was "industry practice for certain traders to rely on the HSC Index in making contracts." *Id.* at 1210. But the court held that plaintiff failed to adequately allege scienter because plaintiff "provide[d] no allegations that specifically connect[ed] Defendants' purported misrepresentations to it." *Id.*

[55] *See, e.g.*, *Friedman* v. *Mercedes Benz USA LLC*, 2013 WL 8336127, at *4 (C.D. Cal. June 12, 2013) (applying the Restatement (Second) of Torts § 533 pursuant to California law); *In re Bear Stearns Companies, Inc. Sec., Derivative, & ERISA Litig.*, 995 F. Supp. 2d 291, 313 (S.D.N.Y. 2014); *Holtkamp v. State Univ. of Iowa Found.*, 2004 WL 1853724, at *5 (Iowa Ct. App. 2004).

[56] *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W. 3d 194, 219 (Tex. 2011); *see also Gawara*, 74 Cal. Rptr. 2d at 688 n.10 ("[T]he 'reason to expect' language in section 533 of the Restatement Second of Torts is not synonymous with 'foreseeability' but bears more similarity to actual *intent* to cause third party reliance.") (citation and internal quotation marks omitted).

Here, Plaintiffs' claims against Non-Transacting Defendants fail for this same reason. Simply put, allegations that "reliance on Defendants' purported misstatements might have been obvious" are no substitute for particularized allegations showing that Non-Transacting Defendants intended or had particularized reasons to expect that each Plaintiff would rely upon their alleged misstatements. *See Rio Grande*, 786 F. Supp. 2d at 1210. Insofar as Plaintiffs seek recovery in fraud with respect to *any* and *every* transaction in which they agreed to make or receive payments linked to LIBOR regardless of any transactional relationship with Defendants, their claims are tantamount to claims by the general public, anyone, anywhere, who saw LIBOR and chose to incorporate it as an interest rate benchmark in a financial transaction. This position is breathtaking in its scope and unsustainable as a matter of law.

2. Certain Plaintiffs' Allegations of Scienter Are Facially Deficient as to All Defendants

Plaintiffs stretch the tort of fraud well past its breaking point by alleging that they are somehow entitled to damages because Defendants' conduct supposedly caused them harm in unexpected ways. *First*, Houston, Regents, and Schwab allege that they were defrauded in connection with transactions involving fixed rate instruments, which have nothing to do with LIBOR. (Houston ¶ 93; Regents ¶ 108; Schwab ¶¶ 11-12, 270.) *Second*, Houston alleges that LIBOR *inflation* caused it harm with respect to auction rate securities that it issued. (Houston ¶ 395.) *Third*, several of the Salix Plaintiffs allege that Defendants' suppression of LIBOR caused them to receive reduced management and incentive fees. (Salix ¶¶ 290-94, 487, 497.) These speculative theories of liability all fail because Plaintiffs do not adequately allege scienter as to any Defendant for the reasons set forth above in Section II.A.1. *See, e.g.*, *Bear Stearns*, 995 F. Supp. 2d at 314 (liability cannot arise from "an unanticipated transaction").

3. Plaintiffs' Allegations of Scienter by Affiliation Fail

Plaintiffs' claims against Defendants that are in the same corporate family as a LIBOR panel bank but are not themselves panel members must fail because, absent certain circumstances not present here, corporations are not liable for the actions of parent, subsidiary or affiliate corporations.[57] Nor can knowledge in the possession of one entity be imputed to another simply because they are in the same corporate family.[58] For example, as the FDIC acknowledges, the entity that it refers to as "HSBC" actually includes three separate entities, only one of these HSBC entities is on the USD LIBOR panel, and the FDIC's financial contracts were with the two other entities. (*See* FDIC ¶ 17; *see also* Freddie Mac ¶ 26.) In order to state a claim of fraud against the non-panel bank Defendants, Plaintiffs must separately allege the elements of fraud as to those particular Defendants.

Plaintiffs have not, however, alleged any facts whatsoever to show that the non-panel bank Defendants had any more knowledge regarding alleged LIBOR manipulation than Plaintiffs' themselves, let alone the requisite intent. Here, Plaintiffs rely on nothing more than the corporate relationship between non-panel bank Defendants and panel bank Defendants. Of course, such a relationship is insufficient to impute knowledge.[59] *See Nokia*, 2011 WL 7310321, at *4 n.5; *Semiconductor Energy*, 531 F. Supp. 2d at 1115.

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[57] *See United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.") (citations omitted).

[58] *See In re Nokia ERISA Litig.*, 2011 WL 7310321, at *4 n.5 (S.D.N.Y. Sept. 6, 2011) ("The fact that Nokia Corp., a corporate parent, is alleged to have perpetrated a fraud does not alone establish a plausible theory for imputing Nokia Corp.'s knowledge of the truth to the subsidiary . . . ."); *Semiconductor Energy Lab. Co. Ltd. v. Chi Mei Optoelectronics Corp.*, 531 F. Supp. 2d 1084, 1115 (N.D. Cal. 2007) (granting summary judgment where "[a]part from general allegations regarding ownership interests, [plaintiff] has offered no evidence that would support imputing knowledge from [alleged patent infringer] to its subsidiaries").

[59] As to the BBA (and its affiliated entities BBA Enterprises Ltd. and BBA LIBOR Ltd.), Plaintiffs fail to allege any facts showing the BBA knew of the alleged instances of individual trader-based manipulation.

B. No Plaintiff Can Plausibly Allege Reliance

1. Plaintiffs Fail to Adequately Allege Actual Reliance

Actual "[r]eliance at common law has, 'two components: awareness of the misrepresentation and action based thereon.'"[60] Plaintiffs' conclusory allegations that it was "inevitable" that "any party holding" LIBOR-linked products would indirectly rely upon the panel bank Defendants' LIBOR submissions and alleged related representations (*e.g.*, Prudential ¶¶ 374, 377) do not suffice because "[a]llegations that the defendants' statements 'were made to the public at large' and that defendants' 'fraudulent misrepresentations created a false sense of security in the public' do[] not plead adequate reliance to sustain a claim for fraud."[61] *In re Lead Paint*, 2002 WL 31474528, at *21. Rather, Plaintiffs must "demonstrate factually that each [ ] entity either received or relied on any misrepresentation." *Id*.

Here, Plaintiffs' generalized allegations are not sufficient to show actual reliance on specific LIBOR submissions and fixings that purportedly affected discrete negotiations for and payments under the transactions at issue.[62] It is not enough for a Plaintiff to allege that it

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[60] *In re Lead Paint*, 2002 WL 31474528, at *20 (N.J. Super. Ct. Law Div. Nov. 4, 2002), *aff'd and rev'd on other grounds*, 2005 WL 1994172 (N.J. Super. Ct. App. Div.).

[61] Common law fraud does not recognize a presumption of reliance, such as the fraud on the market theory available in the federal securities fraud context. *See, e.g.*, *SIPC v. BDO Seidman, LLP*, 222 F.3d 63, 73 (2d Cir. 2000); *Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1189 (N.J. 2000); *Mirkin v. Wasserman*, 858 P.2d 569, 584 (Cal. 1993).

[62] Several Plaintiffs assert holder claims, *i.e.*, fraud claims alleging that investors were induced to *retain* investments in reliance on misrepresentations. (*See, e.g.*, BATA ¶ 312; Regents ¶¶ 569, 581, 588; Freddie Mac ¶¶ 289, 296, 300; Prudential ¶¶ 374, 392.) In many jurisdictions, holder claims are consistently rejected. *See, e.g.*, *WM High Yield Fund v. O'Hanlon*, 2005 WL 6788446, at *13-14 (E.D. Pa. May 13, 2005); *Arnlund v. Deloitte & Touche LLP,* 199 F. Supp. 2d 461, 488 (E.D. Va. 2002); *Chanoff v. U.S. Surgical Corp.*, 857 F. Supp. 1011, 1018 (D. Conn. 1994), *aff'd*, 31 F.3d 66 (2d Cir. 1994); *Kagan v. Edison Bros. Stores, Inc.,* 907 F.2d 690, 692 (7th Cir. 1990) (Illinois law). Even when recognized, holder claims are subject to "direct communication" and "specific reliance" limitations. For example, "[b]ecause of the requirement that a plaintiff prove justifiable reliance," a "sufficiently direct communication from the defendant to the plaintiff" must be alleged "to support a claim that the fraud induced inaction." *In re WorldCom, Inc. Sec. Litig.*, 382 F. Supp. 2d 549, 559 (S.D.N.Y. 2005); *see also In re Enron Corp. Sec., Derivative & ERISA Litig.*, 761 F. Supp. 2d 504, 538 (S.D. Tex. 2011). Here, Plaintiffs have failed to allege any such direct communication because Defendants' representations were "publicly disseminated" and "[P]laintiffs were in no different position than any other" investor. *Goldin v. Salomon Smith Barney, Inc.*, 994 So. 2d 517, 520 (Fla. Dist. Ct. App. 2008) (New York law). Other jurisdictions permit holder claims only if they

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generally relied upon the fact that the payments they received were supposed to reflect USD LIBOR because such an allegation fails to show reliance upon or even awareness of any allegedly false USD LIBOR submissions or other supposed misrepresentations.[63] *See, e.g.*, Maragos ¶ 87-88 ("The County and NIFA detrimentally relied upon the LIBOR Defendants' misrepresentations[] by accepting swap payments.").

Even if Plaintiffs had alleged facts sufficient to show they actually relied upon specific USD LIBOR fixings, such allegations would fail to show actual reliance upon Defendants' allegedly false LIBOR submissions. Common law requires direct reliance on the actual alleged misstatement at issue, not reliance on some derivative or "downstream" version of the statement after it was originally made that may or may not have incorporated a defendant's statement.[64]

2. Plaintiffs Fail to Adequately Allege Justifiable Reliance

Plaintiffs fail to adequately allege that their reliance was justifiable. "While the law does not require that a defrauded party go to the ends of the earth to discover the falsity of a statement,

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meet a heightened pleading standard by alleging "specific reliance on the defendants' representations," such as "how many shares the plaintiff would have sold, and when the sale would have taken place," as "distinguished from unspoken and unrecorded thoughts and decisions." *Small v. Fritz Cos., Inc.*, 65 P.3d 1255, 1265 (Cal. 2003); *see also Anderson v. Daniel*, 724 S.E.2d 401, 403-04 (Ga. Ct. App. 2012); *Dloogatch v. Brincat*, 920 N.E.2d 1161, 1167-68 (Ill. App. Ct. 2009); *Rogers v. Cisco Sys. Inc.*, 268 F. Supp. 2d 1305, 1314 (N.D. Fla. 2003). Plaintiffs fail to allege any action that could be construed as specific reliance.

[63] *See, e.g.*, *Mirkin*, 858 P.2d at 575 (rejecting the fraud-on-the market presumption and holding that a plaintiff "who cannot plead that the alleged misrepresentations ever came to their attention" cannot state a claim for fraud); *Kaufman*, 754 A.2d at 1200 (rejecting the fraud-on-the market presumption and holding that "[i]ndirect reliance occurs when a single communication . . . is clearly communicated to the defrauded party"); *SPIC v. BDO Seidman LLP*, 746 N.E.2d 1042, 1047 (N.Y. 2001) ("Plaintiff cannot sustain a cause of action for fraud if defendant's misrepresentation did not form the basis of reliance.").

[64] *See Gawara v. U.S. Brass Co*., 74 Cal. Rptr. 2d 663, 672 (Cal. Ct. App. 1998) (rejecting an "indirect communications fraud theory" when there is a break in the "chain of fraudulent representations which are repeated by one victim to another"); *SIPC v. BDO Seidman LLP*, 746 N.E.2d 1042, 1047 (N.Y. 2001) ("SIPC cannot claim justifiable reliance on the *filtered statements*, or the absence thereof, as representing either the sum or substance of BDO's representations.") (emphasis added); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 762 F. Supp. 2d 942, 967 (S.D. Tex. 2010) (fraud plaintiff must allege that it "*actually received and relied* upon the defendant's representation"); *Municipality of Bremanger v. Citigroup Global Markets Inc.*, 2013 WL 1294615, at *13 (S.D.N.Y. Mar. 28, 2013) ("These Plaintiffs cannot claim reliance on misrepresentations contained in a document that they did not receive or review before formally deciding to invest.").

patent foolishness is not excused," and this "is doubly so when the plaintiff is" an "extremely complex and sophisticated amalgam of business entities."[65] "[S]ophisticated investors" must take care to "protect themselves from misrepresentations."[66] Thus, "if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means," or his reliance is not considered reasonable.[67] Nor will reliance be found reasonable when a sophisticated party chooses to proceed with a transaction despite notice that the alleged representations are not true.[68]

As a threshold matter, it would have been unreasonable to rely on any USD LIBOR submission from a single LIBOR panel Defendant as a guarantee regarding the integrity of USD LIBOR. Because USD LIBOR represents a trimmed average, this Court already ruled that "no one bank could possibly guarantee that a particular LIBOR fix was determined in a manner that wholly complied with the BBA's rules."[69] *In re LIBOR-Based Fin. Instruments Antitrust Litig.*

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[65] *In re Eugenia VI Venture Holdings, Ltd. Litig.*, 649 F. Supp. 2d 105, 118 (S.D.N.Y. 2008) (citation omitted), *aff'd sub nom. Eugenia VI Venture Holdings, Ltd. v. Glaser*, 370 F. App'x 197 (2d Cir. 2010).

[66] *Bank of Am. Corp. v. Lemgruber*, 385 F. Supp. 2d 200, 230 (S.D.N.Y. 2005); *accord Arfa v. Zamir*, 905 N.Y.S.2d 77, 79-80 (N.Y. App. Div. 2010), *aff'd*, 952 N.E.2d 1003 (N.Y. 2011); *see also Wash. Inv. Partners of Del., LLC v. Sec. House, K.S.C.C.*, 28 A.3d 566, 576 (D.C. 2011); *Hoffman v. 162 N. Wolfe LLC*, 175 Cal. Rptr. 3d 820, 835 (Cal. Ct. App. 2014); *Luciani v. Bestor*, 436 N.E.2d 251, 256 (Ill. App. Ct. 1982); *Massey v. Conseco Servs., L.L.C.*, 879 N.E.2d 605, 611 (Ind. App. 2008), *aff'd on reh'g,* 886 N.E.2d 581 (Ind. App. 2008); *Waldner v. Carr*, 618 F.3d 838, 847 (8th Cir. 2010); *Abboud v. Michals*, 491 N.W.2d 34, 42 (Neb. 1992); *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.*, 905 F. Supp. 2d 814, 823 (S.D. Ohio 2012), *aff'd sub nom. Pharos Capital Partners, L.P. v. Deloitte & Touche*, 535 F. App'x 522 (6th Cir. 2013); *Coastal Bank ssb v. Chase Bank of Texas, N.A.*, 135 S.W.3d 840, 843 (Tex. Ct. App. 2004); *SunTrust Mortg., Inc. v. AIG United Guar. Corp.*, 800 F. Supp. 2d 722, 742 (E.D. Va. 2011), *aff'd in part, rev'd in part on other grounds sub nom. SunTrust Mortg., Inc. v. United Guar. Residential Ins. Co.*, 508 F. App'x 243 (4th Cir. 2013).

[67] *Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V.*, 952 N.E.2d 995,998 (N.Y. 2011); *see also Crigger v. Fahnestock & Co., Inc.*, 443 F.3d 230, 234 (2d Cir. 2006) ("New York courts are particularly disinclined to entertain claims of justifiable reliance" when "sophisticated businessmen" fail to take advantage of their "access to critical information").

[68] *VisionChina Media Inc. v. S'holder Representative Servs., LLC*, 967 N.Y.S.2d 338, 344 (N.Y. App. Div. 2013).

[69] Similarly, many of the challenged statements allegedly made by the BBA are the type of statements—statements of self-promotion, opinion, or future promises—that courts routinely hold cannot induce justifiable reliance. *See,*

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("*LIBOR II*"), 962 F. Supp. 2d 606, 631 n.31 (S.D.N.Y. 2013). Regardless, Plaintiffs' own pleadings demonstrate that they failed to investigate any risks relating to USD LIBOR—and thus, cannot establish reasonable reliance as a matter of law. Plaintiffs aver that they are sophisticated entities that transacted in tens of millions and even billions of dollars in LIBOR-linked financial instruments. (*See, e.g.*, Regents ¶¶ 401-506.) They also plead that they had access, from August 2007 onwards, to information necessary to recognize whether any USD LIBOR submissions were understated, including other allegedly more reliable barometers of credit risk (*e.g.*, credit default swap prices). (*See supra* Background, Section B.) Thus, as sophisticated parties, Plaintiffs had both the ability and obligation to "conduct an independent appraisal of the [investment] risk they [were] assuming," particularly where, as here, the "true nature of the risk being assumed could have been ascertained from reviewing market data or other publicly available information." [70]

Plaintiffs, however, do not plead that they conducted any such independent appraisal. [71] Quite the opposite: Plaintiffs allege that numerous widely publicized reports questioned USD

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e.g., *McMillion v. Dryvit Sys., Inc.*, 552 S.E.2d 364, 368-69 (Va. 2001) (a party is "not justified in placing reliance" upon indefinite, conjectural or exaggerated statements); *Cambridge Capital Real Estate Invs., LLC v. Archstone Enter. LP*, 2014 WL 5079600, at *14 (N.Y. Sup. Oct. 9, 2014) ("[T]he plaintiff generally cannot rely, for example, on puffery, expressions of mere opinion, or representations that are obviously false."); *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 706 (D.C. 1981) (plaintiffs may not place dispositive reliance on opinions or predictions of future events).

[70] *HSH Nordbank AG v. UBS AG*, 941 N.Y.S.2d 59, 66 (N.Y. App. Div. 2012) (granting motion to dismiss fraud claims for failure to satisfy the element of justifiable reliance) (citations and internal quotation marks omitted); *see also Havell Capital Enhanced Mun. Income Fund v. Citibank, N.A.*, 923 N.Y.S.2d 479, 481 (N.Y. App. Div. 2011).

[71] *See Compania Sud-Americana de Vapores v. IBJ Schroder Bank & Trust Co.*, 785 F. Supp. 411, 419-20 (S.D.N.Y. 1992) (reliance on a promise to provide favorable foreign exchange rates was unreasonable when customer could have "compared [the bank's] rates to the interbank rate published in the newspaper"); *see also Atari Corp. v. Ernst & Whinney*, 981 F.2d 1025, 1030-31 (9th Cir. 1992); *Powell Duffryn Terminals, Inc. v. Calgon Carbon Corp.*, 4 F. Supp. 2d 1198, 1206 (S.D. Ga. 1998); *Union Cnty., Iowa v. Piper Jaffray & Co.*, 788 F. Supp. 2d 902, 919 (S.D. Iowa 2011); *Atlantic City Racing Ass'n v. Sonic Fin. Corp.*, 90 F. Supp. 2d 497, 505-06 (D.N.J. 2000); *In re ORFA Sec. Litig.*, 654 F. Supp. 1449, 1465 (D.N.J. 1987); *AT & T Corp. v. Lucas Cnty.*, 381 F. Supp. 2d 714, 717 (N.D. Ohio 2005); *BPP Illinois, LLC v. Royal Bank of Scotland Grp., PLC*, 2013 WL 6003701, at *7-8 (S.D.N.Y. Nov. 13, 2013); *Fulton Fin. Advisors, Nat. Ass'n v. NatCity Invs., Inc.*, 2013 WL 5635977, at *14 (E.D.
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LIBOR's integrity throughout the financial crisis period. The Court has already found these reports sufficient to have put Plaintiffs on inquiry notice of their likely injury.[72] And once inquiry notice was triggered, Plaintiffs' further reliance—without investigation into the risk that their investments were underpaying—was unreasonable as a matter of law.[73] The Court need not credit conclusory allegations to the contrary.[74]

For the same reasons this Court has already articulated, Defendants' purported assurances about the integrity of USD LIBOR, denials of wrongdoing, and reports that "Libor was actually higher than it should be" (*e.g.*, Fannie Mae ¶¶ 73, 95-99, 135; Regents ¶¶ 515-19) were "insufficient to change the view of an ordinary investor that LIBOR was probably being set at artificial levels."[75] *LIBOR III*, 2014 WL 2815645, at *19. As this Court has held, the very same reports on which Plaintiffs rely were rife with cautionary language and served instead to confirm Plaintiffs' ongoing obligation to investigate USD LIBOR's integrity.[76] *Id*. In short, Plaintiffs

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Pa. Oct. 15, 2013); *Foremost Guar. Corp. v. Meritor Sav. Bank*, 910 F.2d 118, 125 (4th Cir. 1990); *SunTrust Mortg., Inc. v. AIG United Guar. Corp.*, 800 F. Supp. 2d 722, 742 (E.D. Va. 2011).

[72] *See LIBOR I*, 935 F. Supp. 2d at 700. Notably, Plaintiffs plead the May 29, 2008 *Wall Street Journal* article on which the Court focused during prior briefing. *See* BATA ¶ 88; Darby ¶¶ 201, 343; Fannie Mae ¶¶ 98; FDIC ¶ 100; Freddie Mac ¶ 108; Hous. ¶¶ 60 n.25; Phila. ¶ 351; Principal Fin. ¶ 144; Principal Funds ¶ 142; Prudential ¶ 185; Regents ¶¶ 347-49; Salix ¶ 209; Schwab ¶ 104.

[73] *See Shah v. Meeker*, 435 F.3d 244, 252 (2d Cir. 2006) (continued reliance unreasonable after news report placed plaintiff on inquiry notice), *abrogated on other grounds*, *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010).

[74] For example, Freddie Mac—which purportedly relied upon USD LIBOR as a measure of LIBOR panel banks' credit risk (*see* Freddie Mac ¶ 284)—allegedly entered into at least 1,260 pay-fixed swaps between August 2007 and May 2010. (*See* Freddie Mac ¶¶ 228, 235, 242, 249, 256, 263, 270, 277.) To engage in that much market activity during a period of heightened sensitivity and to have taken no steps in response to widely disseminated reports of LIBOR manipulation is unreasonable as a matter of law.

[75] If circumstances are "so suspicious as to suggest to a reasonably prudent plaintiff that the defendants' representations may be false," then "plaintiff cannot reasonably rely on those representations." *Schlaifer Nance & Co. v. Estate of Warhol*, 119 F.3d 91, 98 (2d Cir. 1997); *see also In re Eugenia VI Venture Holdings*, 649 F. Supp. 2d at 118 ("[a] heightened degree of diligence" is required where "plaintiff had hints of falsity"); *Gen. Am. Life Ins. Co. v. Castonguay*, 984 F.2d 1518, 1521 (9th Cir. 1993); *SunTrust Mortg.*, 800 F. Supp. 2d at 742; *Dunkin' Donuts Franchised Rests., LLC v. Claudia I, LLC*, 2014 WL 512998, at *3 (E.D. Pa. Feb. 10, 2014).

[76] *See, e.g.*, Fannie Mae Ex. 5 at 3 (Deutsche Bank, U.S. Fixed Income Weekly (Apr. 18, 2008) (USD LIBOR's behavior had been "anomalous" by comparison to another benchmark and other currencies of LIBOR)); Ex. 2 at 1, 4
(continued . . .)

were not entitled to "close [their] eyes and blindly rely upon the assurances." *In re U.S. Office Prods. Co. Sec. Litig.*, 251 F. Supp. 2d 58, 74-75 (D.D.C. 2003).

It is untenable for Plaintiffs to suggest otherwise in light of their contentions that Defendants were motivated to suppress USD LIBOR in order to inflate their reputations and "pay[] lower interest rates on LIBOR-based financial instruments they sold to investors." (*See, e.g.*, Regents ¶¶ 94-95.) "A person of ordinary intelligence would have understood that defendants each had a strong incentive to portray themselves as truthful." *LIBOR I*, 935 F. Supp. 2d at 705. The BBA itself "had a strong incentive to maintain market confidence in LIBOR's integrity," *id.*, and—as Plaintiffs concede—was "not a regulatory body and ha[d] no regulatory function."[77] Thus, "plaintiffs could not have reasonably relied on the reassurances of defendants and the BBA." *LIBOR I*, 935 F. Supp. 2d at 705.

C. Plaintiffs' Conclusory Allegations of Fraudulent Misrepresentations Are Inadequately Pled

1. Plaintiffs' Omission Claims Fail Because Plaintiffs Do Not Adequately Allege Any Duty to Disclose

All Plaintiffs asserting fraud claims, except Maragos, premise their fraud claims on both affirmative misrepresentations *and* omissions. Relevant state law requires that a plaintiff asserting a claim of fraud by omission allege that the defendant was under a duty to disclose to plaintiff the allegedly concealed fact. A duty to disclose can only arise if there is some sort of transactional relationship between the parties.[78] It is "a matter of common sense" that a duty to

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(. . . continued)
(JPMorgan, The Outlook for Libor (May 16, 2008) (referring to the "Libor credibility crisis" and indicators that "BBA Libor is being managed lower by panel members")).

[77] *See* Darby ¶ 44; Hous. ¶ 57; Phila. ¶ 46; Prudential ¶ 45; Salix ¶ 49.

[78] *See, e.g.*, *Wilkins v. Nat'l Broad. Co.*, 84 Cal. Rptr. 2d 329, 339 (Cal. Ct. App. 1999) (finding nondisclosure actionable only where there is "some other relationship between the plaintiff and defendant in which a duty to disclose can arise. Such a relationship can only come into being as a result of some sort of transaction between the
(continued . . .)

disclose must arise out of a transactional relationship because the facts to be disclosed must be "material to a transaction."[79] Thus, Plaintiffs' fraud by omission allegations fail as to all Defendants with whom Plaintiffs allege no transactional dealings.

Moreover, Plaintiffs' fraud by omission allegations fail as to all Defendants—even the Defendants with whom they allegedly contracted—under the laws of those states that hold that no duty of disclosure can arise from a mere arm's-length commercial transaction.[80] For example,

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(. . . continued)
parties.") (alterations, citation, and internal quotation marks omitted); *see also Keck v. Dryvit Sys.*, 830 So. 2d 1, 11 (Ala. 2002); *Mallon Oil Co. v. Bowen/Edwards Assocs., Inc.*, 965 P.2d 105, 111 (Colo. 1998); *Jefferson v. Collins*, 905 F. Supp. 2d 269, 287 (D.D.C. 2012); *Transpetrol, Ltd. v. Radulovic*, 764 So. 2d 878, 880 (Fla. Dist. Ct. App. 2000); *Infrasource, Inc. v. Hahn Yalena Corp.*, 613 S.E.2d 144, 147 (Ga. Ct. App. 2005); *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 593 (Ill. 1996); *Jackson v. Blanchard*, 601 N.E.2d 411, 418-19 (Ind. Ct. App. 1992); *Boegel v. Colo. Nat'l Bank*, 857 P.2d 1362, 1365 (Kan. Ct. App. 1993); *Rossman v. Herb Chambers Commonwealth Ave., Inc.*, 2011 WL 5604052, at *5 (Mass. App. Ct. Nov. 18, 2011); *Schwan v. CNH Am. LLC*, 2006 WL 1215395, at *31 (D. Neb. May 4, 2006); *Berman v. Gurwicz*, 458 A.2d 1311, 1313-14 (N.J. Super. Ct. Ch. Div. 1981), *aff'd*, 458 A.2d 1289 (N.J. Super. Ct. App. Div. 1983); *Cont'l Potash, Inc. v. Freeport-Mcmoran, Inc.*, 858 P.2d 66, 77 (N.M. 1993); *900 Unlimited v. MCI Telecomm. Corp.*, 626 N.Y.S.2d 188, 188 (N.Y. App. Div. 1995) ("In the absence of a contractual relationship or a confidential or fiduciary relationship, a party may not recover for fraudulent concealment of fact, since absent such a relationship, there is no duty to disclose."); *Dow Chem. Co. v. Mahlum*, 970 P.2d 98, 110 (Nev. 1998), *overruled in part on other grounds by GES, Inc. v. Corbitt,* 21 P.3d 11 (Nev. 2001); *Blon v. Bank One, Akron, N.A.*, 519 N.E.2d 363, 368 (Ohio 1988); *Aubrey v. Sanders*, 2008 WL 4443826, at *6 (W.D. Pa. Sept. 26, 2008); *Marshall v. Kusch*, 84 S.W.3d 781, 786 (Tex. App. 2002); *Devansky v. Dryvit Sys.*, 52 Va. Cir. 359, 360-61 (Va. Cir. Ct. 2000); *Wash. Mut. Sav. Bank v. Hedreen*, 886 P.2d 1121, 1123-24 (Wash. 1994).

[79] *LiMandri v. Judkins*, 60 Cal. Rptr. 2d 539, 543-44 (Cal. Ct. App. 1997); *see also Gomez-Jimenez v. New York Law Sch.*, 956 N.Y.S.2d 54, 59 (N.Y. App. Div. 2012).

[80] *See Camillo v. Wash. Mut. Bank, F.A.*, 2009 WL 3614793, at *7 (E.D. Cal. Oct. 26, 2009); *Sununu v. Philippine Airlines, Inc.*, 792 F. Supp. 2d 39, 51 (D.D.C. 2011) (finding no "duty to speak" in arrangement that was no "more than an arm's length transaction"); *Watkins v. NCNB Nat'l Bank, N.A.*, 622 So. 2d 1063, 1065 (Fla. Dist. Ct. App. 1993); *Gavin v. AT&T Corp.*, 543 F. Supp. 2d 885, 912 (N.D. Ill. 2008) ("[I]n absence of fiduciary or other confidential relationship between plaintiff and defendant, defendant's silence does not constitute fraud."); *Creative Consumer Concepts, Inc. v. Kreisler*, 2007 WL 315805, at *6 (D. Kan. Jan. 31, 2007), *aff'd,* 563 F.3d 1070 (10th Cir. 2009); *Peri & Sons Farms, Inc. v. Jain Irrigation, Inc.*, 933 F. Supp. 2d 1279, 1292-94 (D. Nev. 2013); *United Van Lines, LLC v. Lohr Printing, Inc.*, 2014 WL 837087, at *4 (D.N.J. Mar. 4, 2014) ("A party has no duty to disclose information to another party in a business transaction unless a fiduciary relationship exists between them, the transaction itself is fiduciary in nature, or one party expressly reposes a trust and confidence in the other.") (internal quotation marks and alterations omitted); *Carnahan v. SCI Ohio Funeral Servs.*, 2001 WL 242555, at *5 (Ohio Ct. App. Mar. 13, 2001); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 532 (W.D. Pa. 2000), *aff'd*, 234 F.3d 1265 (3d Cir. 2000) ("[T]here is virtually no Pennsylvania case in which a defendant has been held to have a duty to speak when both the plaintiff and defendant were sophisticated business entities, entrusted with equal knowledge of the facts and ample access to legal representation.") (internal citations, quotation marks, and alterations omitted); *W. Capital Partners, LLC v. Allegiance Title & Escrow, Inc.*, 520 F. Supp. 2d 777, 783 (E.D. Va. 2007) (finding no duty to disclose in "an arms-length business transaction between sophisticated parties").

it is black letter law in New York that a fraudulent concealment claim must be based on a "special relationship or fiduciary obligation."[81] Accordingly, New York Courts routinely dismiss omission claims by sophisticated parties even when defendants are alleged to have had superior knowledge of the allegedly undisclosed matter.[82]

2. Plaintiffs Do Not Allege Any False Statements Regarding Pre-August 2007 Transactions

Plaintiffs' fraud claims against Contracting Defendants should be dismissed to the extent they concern transactions entered into *before* Defendants made any allegedly false statements.[83] Prior to the inception of the alleged suppression of USD LIBOR in August 2007, Defendants could not have made knowingly false statements about the LIBOR-linked payments that Plaintiffs were allegedly supposed to receive. Indeed, a representation of future intent would only be potentially actionable if the Contracting Defendants intended *at the time* for Plaintiffs' investments to pay less interest. *See Brown v. Lockwood*, 432 N.Y.S.2d 186, 194 (N.Y. App. Div. 1980). But Plaintiffs do not and cannot allege that any Contracting Defendant had such intent. To have intended to mislead Plaintiffs regarding contracts executed as early as 1992, Contracting Defendants would have had to possess the powers of foresight necessary to predict that LIBOR panel banks might make artificially low USD LIBOR submissions in the future amid the unprecedented circumstances of the financial crisis.

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[81] *Gomez-Jimenez v. New York Law Sch.*, 956 N.Y.S.2d 54, 60 (N.Y. App. Div. 2012).

[82] *See, e.g.*, *Sebastian Holdings, Inc. v. Deutsche Bank AG*, 912 N.Y.S.2d 13, 15 (N.Y. App. Div. 2010) ("Plaintiff's alleged reliance on defendant's superior knowledge and expertise . . . ignores the reality that . . . arm's-length transactions . . . between sophisticated business entities . . . do not give rise to fiduciary duties."). Allegedly superior knowledge is doubly irrelevant here because Plaintiffs were on notice of the very information Defendants allegedly failed to disclose. *See, e.g.*, *Union Cnty., Iowa v. Piper Jaffray & Co.*, 788 F. Supp. 2d 902, 919 (S.D. Iowa 2011) (finding no duty to disclose where plaintiff "had access, in one form or another, to virtually all of the information they claim [defendant] failed to disclose").

[83] *See, e.g.*, Maragos ¶ 69-77.

3. Fraud Claims for Post-August 2007 Transactions That Duplicate Plaintiffs' Breach of Contract Claims Fail[84]

Plaintiffs allege fraud claims against Defendants with which they transacted and are also seeking recovery under a breach of contract theory. (*See, e.g.*, Fannie Mae ¶ 135.) But "a cause of action seeking damages for fraud cannot be sustained when the only fraud charged relates to a breach of contract or where the fraud claim is duplicative of a breach of contract claim." *Renaissance Equity Holding, LLC v. Al-An Elevator Maint. Corp.*, 2012 WL 2731958, at *6 (N.Y. Sup. Ct. July 2, 2012).

When a claim does not "allege fraud extraneous and collateral to the contract" and "simply alleges that plaintiff failed to fulfill its contractual obligations," then the claim will be rejected as duplicative of the breach of contract claim.[85] Here, all of the fraud allegations are tied to agreements between Plaintiffs and Contracting Defendants. The core of these allegations is that Contracting Defendants "misrepresented . . . and omitted to disclose that the Floating Amounts," which they "were contractually obligated to pay" on LIBOR-linked transactions,

[84] Plaintiffs asserting fraud claims against Contracting Defendants generally allege that they entered into and performed interest rate swaps and other financial instruments which were governed by a previously executed ISDA Master Agreement or other contract. The ISDA Master Agreement set forth standardized terms that applied to the transactions entered into between the parties, including a default New York choice of law provision, which the parties could elect. (*See*, *e.g.*, Freddie Mac Ex. 21, Schedule, Part 4(1).) Several Complaints attach copies or descriptions of the governing contracts, or reference the applicable choice of law provisions. With the exception of a few instances of a Pennsylvania choice of law clause (*see* Phila. Exs. C-D), the parties' agreements were governed by New York choice of law clauses. In any event, the principle under New York law discussed here, that representations germane to a contract do not give rise to a claim for fraud, applies in other jurisdictions. *See, e.g.*, *Regency Commc'ns, Inc. v. Cleartel Commc'ns Inc.*, 160 F. Supp. 2d 36, 41 (D.D.C. 2001) ("there is a general reluctance to allow a claim of fraud to proceed when the fraud contemplated by the plaintiff does not seem to be extraneous to the contract, but rather on the performance of the contract itself") (citation and internal quotation marks omitted); *see also Brooksbank v. Private Capital Grp., LLC*, 2014 WL 1493939, at *3 (N.D. Cal. Apr. 16, 2014); *State Capital Title & Abstract Co. v. Pappas Bus. Servs., LLC*, 646 F. Supp. 2d 668, 676 (D.N.J. 2009); *Bruno v. Bozzuto's, Inc.*, 850 F. Supp. 2d 462, 466-68 (M.D. Pa. 2012); *Walker v. Citimortgage, Inc.*, 2014 WL 67245, at *12-13 (S.D. Tex. Jan. 8, 2014); *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 507 S.E.2d 344, 347-48 (Va. 1998).

[85] *Int'l Plaza Assocs., L.P. v. Lacher*, 881 N.Y.S.2d 414, 415 (N.Y. App. Div. 2009); *see also W.B. David & Co., Inc. v. DWA Commc'ns, Inc.*, 2004 WL 369147, at *5 (S.D.N.Y. Feb. 26, 2004) ("The mere fact that Defendants allegedly sent false invoices to the Plaintiffs after the consummation of their agreement is not sufficient to make these alleged 'statements' collateral or extraneous to the agreement.").

"would be calculated by reference to manipulated Libor." (*E.g.*, Prudential ¶¶ 372(a), (f); Salix ¶¶ 12, 476(f).) Such allegations, which merely recast alleged violations of contractual provisions as fraud, at most, "give[] rise to an action for breach of contract, not one in tort." *Rabin v. Mony Life Ins. Co.*, 387 F. App'x 36, 40 (2d Cir. 2010) (citation and internal quotation marks omitted).

While a fraud claim may be based on allegations that a defendant fraudulently induced the plaintiff to enter into a contract, "this exception is itself subject to the exception that the false promise giving rise to a fraud claim cannot be a promise for which the parties contracted." *EQT Infrastructure Ltd. v. Smith*, 861 F. Supp. 2d 220, 234 (S.D.N.Y. 2012). Thus, when a plaintiff's fraud claim "arises out of the same facts as [the] breach of contract claim, with the addition only of an allegation that defendant never intended to perform the precise promises spelled out in the contract between the parties," the fraud claim is duplicative and cannot stand.[86] Here, Plaintiffs' alleged misrepresentations and omissions "relate[] only to [Contracting Defendants'] purported obligation to make payments under the [] Contract and, thus, [are] not collateral or extraneous to the contract." *Manney v. Reichert*, 2014 WL 4805046, at *15 n.12 (E.D.N.Y. Sept. 26, 2014).

4. Fraud Claims Based on Extra-Contractual Representations Are Precluded

Plaintiffs allege, to varying degrees, that Contracting Defendants "failed to disclose the fraud and collusion relating to USD bbaLIBOR™," and "affirmatively misrepresented their credit risk and liquidity" and that USD LIBOR was competitively determined. (*See, e.g.*, Freddie Mac ¶ 299; Principal Funds ¶ 228.) Plaintiffs do not allege that these representations are explicit contractual terms in the ISDA Master Agreement. As discussed above, to the extent any such covenants may be implied, Plaintiffs have "allege[d] nothing more than a breach of the

[86] *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 196 (2d Cir. 2001) (quotation omitted); *see also TVT Records v. Island Def Jam Music Grp.*, 412 F.3d 82, 90 (2d Cir. 2005) ("[U]nder New York law, the failure to disclose an intention to breach is not actionable as a fraudulent concealment.").

contract," and no "cause of action for fraud in the inducement" may stand. *New York Univ. v. Cont'l Ins. Co.*, 662 N.E.2d 763, 769 (N.Y. 1995). Regardless, even if the alleged representations are extraneous to the ISDA agreement, Plaintiffs expressly disclaimed any reliance thereon.[87] (*See, e.g.*, FDIC Ex. 31, Schedule, Part 5(e).[88]) In addition to the merger clause in the ISDA Master Agreement that excludes non-contractual representations (*e.g.*, Fannie Mae Ex. 17, ¶ 9(a)), the agreement's disclaimer of reliance is "sufficiently particular" to defeat an allegation that Contracting Defendants "induced [Plaintiffs] to enter into the Transactions by allegedly misrepresenting the potentially ruinous risks of the Transactions." *JPMorgan Chase Bank*, 2010 WL 4868142, at *6, 9.[89] Thus, Plaintiffs' fraud claims against Contracting Defendants should be dismissed.

[87] The disclaimer of reliance in the ISDA agreement was a representation by Plaintiff and Contracting Defendant that, for each swap or other derivative transaction entered into, each party (i) "has made its own independent decisions to enter into that Transaction"; (ii) "is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into that Transaction"; (iii) "is capable of . . . understanding . . . and accepts the terms, conditions and risks of that Transaction"; and (iv) agrees that "[t]he other party is not acting as a fiduciary for or an advisor to it in respect of that Transaction." *JPMorgan Chase Bank, N.A. v. Controladora Comercial Mexicana S.A.B. De C.V.*, 2010 WL 4868142, at *3 (N.Y. Sup. Ct. Mar. 16, 2010).

[88] *See* FDIC, Ex. 23.2 at 12; Ex. 24 at 30; Ex. 27.2 at 7; Ex. 29.2 at 26; Ex. 30.2 at 31; Ex. 31 at 40; Ex. 32.2 at 21-22; Ex. 34 at 46; Ex. 35 at 40-41; Ex. 37.2 at 23-24; Ex. 40.2 at 21; Ex. 41 at 33; Ex. 42 at 33; Ex. 43.2 at 26-27; Ex. 44 at 16; Ex. 46.2 at 28; Ex. 47 at 27; Ex. 48 at 26-27; Ex. 49 at 26-27; Ex. 51 at 35-36; Ex. 52 at 29; Ex. 53 at 10; Ex. 54 at 10; Ex. 55.2 at 2; Ex. 56 at 12; Ex. 57 at 10; Ex. 58 at 11-12; Ex. 59 at 11; Ex. 60 at 8; Ex. 61 at 11-12; Ex. 62 at 11-12; Ex. 63 at 15-16; Ex. 64 at 11; Ex. 65 at 10-11; Ex. 66 at 9-10; Ex. 67 at 11-12; Ex. 68 at 11; Ex. 69.2 at 16; Ex. 71 at 11; Ex. 72 at 26; Ex. 73 at 8; *see also* Freddie Mac Ex. 20 at 27; Ex. 25 at 28.

[89] *See also Hinesley v. Oakshade Town Ctr.*, 37 Cal. Rptr. 3d 364, 372 (Cal. Ct. App. 2005); *Prince Heaton Enters., Inc. v. Buffalo's Franchise Concepts, Inc.*, 117 F. Supp. 2d 1357, 1361 (N.D. Ga. 2000); *Circle Ctr. Dev. Co. v. Y/G Ind. L.P.*, 762 N.E.2d 176, 179-80 (Ind. Ct. App. 2002); *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.,* 905 F. Supp. 2d 814, 823 (S.D. Ohio 2012); *Donachy v. Playground Destination Props., Inc.*, 2013 WL 3793033, at *3 (D.N.J. July 19, 2013); *Alten v. T.A.E.I., Inc.*, 1994 WL 530140, at *3 (E.D. Pa. Sept. 29, 1994); *Westernbank Puerto Rico v. Kachkar*, 2009 WL 6337949, at *24 (D.P.R. Dec. 10, 2009), *report and recommendation adopted*, 2010 WL 1416521 (D.P.R. Mar. 31, 2010); *K3C Inc. v. Bank of Am., N.A.*, 204 F. App'x 455, 462-63 (5th Cir. 2006); *Jared & Donna Murayama 1997 Trust ex rel. Murayama v. NISC Holdings, LLC*, 2011 WL 7575011, at *5 n.2 (Va. Cir. Ct. Feb. 14, 2011).

5. Plaintiffs' Other Allegations Regarding Alleged Misstatements Fail

The BATA, FDIC, Fannie Mae, Freddie Mac, Principal Financial, Principal Funds, and Schwab Plaintiffs allege that Defendants falsely represented on a daily basis that LIBOR submissions represented *competitively determined* rates.[90] These allegations are devoid of factual support. None of these Plaintiffs point to any representation made by any Defendant to this effect. Moreover, although several of these Plaintiffs discuss rules governing the LIBOR submission process in their complaints,[91] none of those rules indicate that LIBOR submissions represent "competitively determined rates." As this Court has already ruled, "the process of setting LIBOR was never intended to be competitive." *LIBOR I*, 935 F. Supp. 2d at 688.

Plaintiffs also assert that Defendants made misrepresentations and omissions in offering materials related to LIBOR-based instruments that they purchased. (*See, e.g.*, BATA ¶ 295; Principal Fin. ¶ 229; Principal Funds ¶ 227; Schwab ¶ 307.) But these generalized assertions—none of which identify any specific misstatement—fall well short of satisfying Rule 9(b)'s requirements. *See Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006). These allegations are also untenable with respect to Defendants that did not issue, offer or sell the LIBOR-based instruments in question.

D. Certain Allegations of Damages Fail

To state a claim for fraud, each Plaintiff must adequately allege that it suffered damages proximately caused by its reliance on the alleged misrepresentations.[92] Thus, damages "must not

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[90] BATA ¶ 297; Schwab ¶ 310; FDIC ¶ 288; Freddie Mac ¶ 282; Principal Fin. ¶ 225; Principal Funds ¶ 223.

[91] BATA ¶¶ 40-47; Schwab ¶¶ 56-63; FDIC ¶¶ 60-66; Freddie Mac ¶¶ 67-73; Principal Fin. ¶¶ 34-41; Principal Funds ¶¶ 32-39.

[92] *See, e.g.*, *Wilson v. First Union Nat'l Bank of Georgia*, 716 So. 2d 722, 727 (Ala. Civ. App. 1998); *Leegin Creative Leather Prods., Inc. v. Diaz*, 33 Cal. Rptr. 3d 139, 143-44 (Cal. Ct. App. 2005); *Stovell v. James*, 810 F. Supp. 2d 237, 244-47 (D.D.C. 2011), *aff'd*, 526 F. App'x 1 (D.C. Cir. 2013); *Walker v. Walker*, 668 S.E.2d 330,
(continued . . .)

only be distinctly alleged but [their] causal connection with the reliance on the representations must be shown."[93] Here, all Plaintiffs fail to plead one or more forms of alleged damages adequately, and their corresponding fraud claims should be dismissed.

No Proximate Cause for Claims Against Non-Transacting Defendants. Plaintiffs' damages allegations against Non-Transacting Defendants are impermissibly remote. The chain of proximate causation does not extend to literally anyone who incorporated LIBOR into a financial transaction, regardless of whether the person or transaction was known in some way to Defendants.[94] To hold otherwise would subject the Non-Transacting Defendants to liability of "indeterminate extent, magnitude and duration," which is precisely the sort of liability that "courts have always drawn back" from imposing.[95]

Duplicative Damages Claims Against Contracting Defendants. To the extent Plaintiffs' fraud claims seek damages that are "also attributable to Defendants' alleged breach of contract," the fraud claims are redundant and should be dismissed. *MashreqBank, psc v. ING Group N.V.*,

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(. . . continued)
334-35 (Ga. Ct. App. 2008); *Tricont'l Indus. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 841 (7th Cir. 2007) (Illinois law); *Heckler & Koch, Inc. v. German Sport Guns GmbH*, 976 F. Supp. 2d 1020, 1031-33 (S.D. Ind. 2013); *Shrout v. Am. Acad. of Family Physicians*, 1998 WL 164762, at *2 (D. Kan. Mar. 10, 1998); *Luscher v. Empkey*, 293 N.W.2d 866, 867-69 (Neb. 1980); *Villa v. Silver State Fin. Servs., Inc.*, 2011 WL 1979868, at *7 (D. Nev. May 20, 2011); *Dist. 1199P Health & Welfare Plan* v. *Janssen, L.P.*, 784 F. Supp. 2d 508, 532 (D.N.J. 2011); *Laub v. Faessel*, 745 N.Y.S.2d 534, 536-37 (N.Y. App. Div. 2002); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 934-35 (3d Cir. 1999) (applying Pennsylvania law); *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 21 F. Supp. 2d 664, 676 (E.D. Tex. 1998), *aff'd*, 199 F.3d 788 (5th Cir. 2000); *Caviness v. DeRand Res. Corp.*, 983 F.2d 1295, 1305 (4th Cir. 1993) (Virginia law); *Glassner v. R. J. Reynolds Tobacco Co.*, 223 F.3d 343, 353-54 (6th Cir. 2000) (Ohio law); *Valle-Ortiz v. R.J. Reynolds Tobacco Co.*, 385 F. Supp. 2d 126, 134 (D.P.R. 2005); *Wilson* v. *Bank of Am., N.A.*, 2013 WL 275018, at *5-6 (W.D. Wash. Jan. 24, 2013).

[93] *Serv. by Medallion, Inc. v. Clorox Co.*, 52 Cal. Rptr. 2d 650, 656 (Cal. Ct. App. 1996); *see also Laub v. Faessel*, 745 N.Y.S.2d 534, 536 (N.Y. App. Div. 2002) ("there [must] be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered").

[94] *See, e.g.*, *Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris, Inc.*, 171 F.3d 912, 918 (3d Cir. 1999) (dismissing fraud claims against tobacco companies by reimbursers of tobacco-related health costs, because only smokers themselves were sufficiently direct recipients of alleged misrepresentations).

[95] *Roman v. Delta Air Lines, Inc.*, 441 F. Supp. 1160, 1167 (N.D. Ill. 1977) (quoting Prosser, *Misrepresentation and Third Parties*, 19 Vand. L. Rev. 231, 251-52 (1966)).

2013 WL 5780824, at *5-6 (S.D.N.Y. Oct. 25, 2013). Moreover, Plaintiffs' "request[s] [for] punitive damages" based on the alleged fraud (*e.g.*, Prudential ¶ 382; Salix ¶ 485) do "not suffice to sustain a fraud claim where the alleged misrepresentations did not result in any loss independent of the damages allegedly incurred for breach of contract." *Id.* at *6.

Sporadic Inflation of LIBOR. Houston alleges that, in addition to receiving less or paying more on interest rate swaps due to the persistent suppression of LIBOR, LIBOR *inflation* caused it harm with respect to auction rate securities it had issued. (Houston ¶¶ 395, 413.) These damages allegations are inadequate because (1) Houston fails to plead facts demonstrating that LIBOR was manipulated upwards on the dates of its payments to purchasers using the LIBOR-based "fail rate formula,"[96] and (2) in the face of its allegations that Defendants persistently suppressed LIBOR throughout the relevant period (*e.g.*, Houston ¶ 5), Houston cannot contrarily allege damage from any isolated instance of alleged inflation occurring during the same period.[97]

Fixed-Rate Instruments. The Schwab Plaintiffs claim that "suppressing LIBOR would always, and obviously, tend to suppress the rates of return on fixed-rate instruments by making lower rates of return relatively more attractive" (Schwab ¶¶ 11-12, 270), but that conclusory allegation lacks factual support. To the contrary, there is no basis, obvious or otherwise, to infer that LIBOR had any bearing on payments that were *not* tied to LIBOR.

Management and Incentive Fees. Salix alleges that Defendants' suppression of LIBOR caused certain investment funds to suffer losses, which in turn reduced management and incentive fees tied to the performance of those funds.[98] Salix's own allegations, however,

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[96] *See LIBOR III*, 2014 WL 2815645, at *5 ("it [is] necessary for plaintiffs to plead that they had transacted on *specific days* when LIBOR was manipulated") (emphasis added).

[97] *See, e.g.*, *Rieger v. Drabinsky* (*In re Livent Noteholders Sec. Litig.*), 151 F. Supp. 2d 371, 405 (S.D.N.Y. 2001) ("conflicting pleadings" need not be accepted as true).

[98] Salix ¶¶ 290-94, 487, 497.

demonstrate the attenuated nature of the purported harm.[99] As such, the causal link between the alleged fraud and harm is "far too attenuated."[100]

Floating-Rate versus Fixed-Rate Instruments. Plaintiffs Houston and Regents allege that they engaged in "comparative analyses between LIBOR-based" instruments and "fixed rate instruments" in determining in which instruments to invest, and the alleged LIBOR suppression "compromised this analysis" by "making the LIBOR-based instrument appear more attractive." (Houston ¶ 93; Regents ¶ 108.) These allegations fail because, even if suppressed LIBOR caused LIBOR-based instruments to appear more attractive than fixed-rate instruments, Plaintiffs do not plead that this caused them to suffer any losses. Moreover, Plaintiffs' allegations are conclusory: neither identifies a single transaction where any compromised comparative analysis caused them to invest differently.

Generalized Damages Claims. Conclusory or speculative allegations as to damages are insufficient to state a claim for fraud. *See Gregor v. Rossi*, 992 N.Y.S.2d 17, 19 (N.Y. App. Div. 2014). Plaintiffs BATA, Fannie Mae, FDIC, Houston and Triaxx broadly assert that their "LIBOR-based financial products" suffered losses, but, at best, selectively describe these

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[99] Salix alleges eight distinct steps between the alleged LIBOR manipulation and their harm. (Salix ¶¶ 12-16, 294.)

[100] *Randolph Equities, LLC v. Carbon Capital, Inc.*, 2007 WL 914234, at *8 (S.D.N.Y. Mar. 26, 2007); *see also Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 930, 934-35 (3d Cir. 1999) ("[t]he sheer number of links in the chain of causation that connect" the misrepresentation to the damages rendered the link too remote). That the Funds' demise occurred during the height of the financial crisis makes Salix's claims even less plausible. *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 174 (2d Cir. 2005) ("[W]hen the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the plaintiff's loss was caused by the fraud decreases, and a plaintiff's claim fails when it has not adequately pled facts which, if proven, would show that its loss was caused by the alleged misstatements as opposed to intervening events.") (internal alterations, citations, and quotation marks omitted); *see also Hampshire Equity Partners II, L.P. v. Teradyne, Inc.*, 2005 WL 736217, at *5 (S.D.N.Y. Mar. 30, 2005) (dismissing fraud claim for failure to adequately plead causation where it was "infinitely more probable that the proximate cause of [the plaintiff's losses] was the overall decline in the high-tech market" in the early 2000's rather than the misrepresentations).

products and the alleged injury.[101] As this Court has noted, damages are merely "conceivable," rather than "plausible," in the absence of specific factual allegations. *LIBOR III*, 2014 WL 2815645, at *5.

Punitive Damages. Many of the FDIC's claims for punitive damages fail as a matter of law. *First*, its claim on behalf of TierOne Bank is contrary to Nebraska law, which prohibits the award of punitive damages.[102] *Second*, the FDIC's claims on behalf of Frontier Bank, Eurobank, R-G Premier Bank of Puerto Rico, and Westernbank Puerto Rico should be dismissed because Washington and Puerto Rico do not permit punitive damages in the absence of express statutory authorization, and no such authorization exists for fraud.[103] *Third*, the FDIC's claim on behalf of Colonial Bank and Superior Bank fails because "punitive damages are available in a fraud action [in Alabama] only where the plaintiff proves . . . that the misrepresentation that is the basis of the fraud is made with the knowledge of falsity and *with the purpose of injuring the party*."[104] But, as the FDIC does not allege that Defendants entered into transactions with those banks, it cannot plausibly allege that Defendants intended to injure them.

[101] For example, Fannie Mae alleges damages with respect to mortgages, mortgage-backed securities, and loans, but fails to provide any specific factual allegations as to how movements in LIBOR proximately caused changes in the value or revenue streams associated with these instruments. (Fannie Mae ¶ 10.) Several other Plaintiffs broadly allege that they held "LIBOR-based financial instruments," but only provide specific allegations as to certain products. *See, e.g.*, BATA ¶¶ 10-11, 250-52 (specific allegations as to interest rate swaps only); Houston ¶¶ 388, 390, 392, 394-95, 413 (specific allegations as to interest rate swaps and auction rate securities only); FDIC ¶¶ 292, 296, 303, 307 (making sporadic references to MBS and floating-rate loans (¶¶ 2, 117), and failing to allege any harm suffered from holding these instruments aside from antitrust injury (¶¶ 400, 420, 433, 438)); Triaxx ¶¶ 162, 168 (specific allegations as to private label mortgage-backed securities only).

[102] *See Kammerer v. Wyeth*, 2011 WL 5237754, at *4-5 (D. Neb. Nov. 1, 2011).

[103] *See In re Gonzalez*, 2012 WL 5438957, at *7 (Bankr. D.P.R. Nov. 2, 2012); *Kammerer v. W. Gear Corp.*, 618 P.2d 1330, 1337 (Wash. Ct. App. 1980), *aff'd*, 635 P.2d 708, 713 (Wash. 1981).

[104] *Cavalier Mfg. v. Jackson*, 823 So. 2d 1237, 1248 (Ala. 2001) (emphasis added), *overruled on other grounds by Ex parte Thicklin*, 824 So. 2d 723 (Ala. 2002).

III. PLAINTIFFS ASSERTING AIDING AND ABETTING FRAUD FAIL TO STATE A CLAIM

BATA, Darby, Fannie Mae, FDIC, Houston, Philadelphia, Principal Financial, Principal Funds, Prudential, Regents, Salix, Schwab, and Triaxx assert aiding and abetting common law fraud claims against all Defendants. For several Plaintiffs, no such cause of action exists under applicable state law. As to the others, these claims fail because Plaintiffs fail to adequately allege their underlying fraud claims[105] and to state their aiding and abetting claims with the particularity required by Rule 9(b).

As a threshold matter, the aiding and abetting claims asserted by Houston, Philadelphia and certain of the aiding and abetting claims asserted by the FDIC[106] are barred under applicable state law because the relevant jurisdictions do not permit claims for aiding and abetting common law fraud.[107] In each of the jurisdictions that does recognize an aiding and abetting fraud claim,[108] a plaintiff alleging it must plead at least the following: (1) the existence of an independent, underlying fraud committed by a third party; (2) defendant's actual knowledge of the underlying fraud and of defendant's role in furthering that fraud; and (3) defendant's

[105] *See, e.g.*, *Harrison v. Downey S & L Ass'n,* 2009 WL 2524526, at *4 (S.D. Cal. Aug. 14, 2009); *Sabre Int'l Sec. v. Torres Advanced Enter. Solutions, LLC*, 2014 WL 341071, at *5 (D.D.C. Jan. 30, 2014); *Bachner + Co. v. White Rose Food, Inc.*, 2010 WL 3210689, at *6 (D.N.J. Aug. 11, 2010); *Brashkis v. Hyperion Capital Grp.*, 2011 WL 6130787, at *3 (W.D. Wash. Dec. 8, 2011).

[106] FDIC's aiding and abetting fraud claims on behalf of failed banks in Alabama, Georgia, Illinois, Kansas, and Ohio fail.

[107] *Cont'l Cas. Co. v. Compass Bank*, 2006 WL 566900, at *11 (S.D. Ala. Mar. 6, 2006); *BMC-Benchmark Mgmt. Co. v. Ceebraid-Signal Corp.*, 292 F. App'x 784, 787 (11th Cir. 2008) (Georgia law); *Renovitch v. Kaufman*, 905 F.2d 1040, 1049 (7th Cir. 1990) (Illinois law); *State ex rel. Sec'y of Soc. & Rehab. Servs. v. Fomby*, 715 P.2d 1045, 1047 (Kan. Ct. App. 1986); *DeVries Dairy, L.L.C. v. White Eagle Coop. Ass'n*, 974 N.E.2d 1194, 1194 (Ohio 2012); *Dottore v. Nat'l Staffing Servs., LLC*, 2010 WL 2106223, at *9 (N.D. Ohio May 25, 2010); *Zafarana v. Pfizer Inc.*, 724 F. Supp. 2d 545, 560 (E.D. Pa. 2010); *In re Enron Corp. Sec., Derivative & "Erisa" Litig.*, 2006 WL 3716669, at *8 (S.D. Tex. Dec. 12, 2006), *aff'd sub nom. In re Enron Corp. Sec.*, 535 F.3d 325 (5th Cir. 2008).

[108] These jurisdictions are California, District of Columbia, Nevada, New Jersey, New York, and Washington. The following Plaintiffs assert aiding and abetting common law fraud claims under the laws of one or more of these states: FDIC (California, Nevada, Washington); BATA (California); Schwab (California, Nevada); Regents (California); Fannie Mae (District of Columbia); Principal Fin. (New York); Principal Funds (New York); Prudential (New Jersey); Salix (New York); Triaxx (New York); and Darby (New York).

substantial assistance in furthering the underlying fraud such that defendant's conduct is a proximate cause of plaintiff's injuries.[109] Rule 9(b)'s heightened pleading standard applies. *Krys v. Pigott*, 749 F.3d 117, 129 (2d Cir. 2014). Here, all Plaintiffs fail to allege facts sufficient to satisfy *any* of these three elements.

A. Plaintiffs Fail to Plead That Any Defendant Had "Actual Knowledge" of Another's Fraud

To state an aiding and abetting claim, Plaintiffs must allege adequately that Defendants had "actual knowledge" of a principal's fraud and of their alleged role within that fraud.[110] Constructive knowledge—or any other mental state less than "actual knowledge"—cannot support a claim for aiding and abetting common law fraud.[111] Thus, a plaintiff cannot "satisfy Rule 9(b) . . . based on allegations of the [defendant's] suspicions or ignorance of obvious 'red flags' or warning signs indicating the fraud's existence."[112] *Rosner v. Bank of China*, 2008 WL

[109] *See, e.g.*, *Facebook, Inc. v. MaxBounty, Inc.*, 274 F.R.D. 279, 285 (N.D. Cal. 2011); *Ali v. Mid-Atl. Settlement Servs.*, 640 F. Supp. 2d 1, 9 (D.D.C. 2009); *Dow Chem. Co. v. Mahlum*, 970 P.2d 98, 112 (Nev. 1998), *overruled in part on other grounds by GES, Inc. v. Corbitt*, 21 P.3d 11 (Nev. 2001); *Arcand v. Brother Int'l Corp.*, 2010 WL 3907333, at *17 (D.N.J. Sept. 29, 2010); *Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 883 N.Y.S.2d 486, 489 (N.Y. App. Div. 2009); *Brashkis*, 2011 WL 6130787, at *3.

[110] *See, e.g.*, *Henry v. Lehman Commercial Paper, Inc. (In re First Alliance Mortg. Co.)*, 471 F.3d 977, 993 (9th Cir. 2006) ("[A]iding and abetting liability under California law, as applied by the California state courts, requires a finding of actual knowledge, not specific intent"); *Facebook, Inc.*, 274 F.R.D. at 285 (defendant must have "actual knowledge" of "his or her role in furthering [the wrong]"); *Ali*, 640 F. Supp. 2d at 9 (defendant must have "knowledge of his role as part of an overall illegal or tortious activity at the time"); *Dow Chem.*, 970 P.2d at 112 (defendant must be "aware of its role in promoting the fraud[] at the time"); *Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014) ("Actual knowledge is required to impose liability on an aider and abettor under New York law.") (internal quotation marks omitted).

[111] *See, e.g.*, *Impac Warehouse Lending Grp. v. Credit Suisse First Bos. Corp.*, 2006 WL 6935318, at *7 (C.D. Cal. June 20, 2006) ("Under California law, an aider and abettor to a fraud must have actual and not merely constructive knowledge of the fraud at the time the alleged assistance is rendered."); *Groom v. Bank of Am.*, 2012 WL 50250, at *4 (M.D. Fla. Jan. 9, 2012); *Krys*, 749 F.3d at 131 ("Constructive knowledge . . . is insufficient to sustain a claim for aiding and abetting fraud . . . ") (New York law); *Kolbeck v. LIT Am., Inc.*, 939 F. Supp. 240, 246 (S.D.N.Y. 1996), *aff'd*, 152 F.3d 918 (2d Cir. 1998) ("New York courts and federal courts in this district, have required actual knowledge.").

[112] The Court's decision regarding the aiding and abetting manipulation claims asserted by other plaintiffs under the Commodity Exchange Act ("CEA"), *LIBOR I*, 935 F. Supp. 2d at 722-24, is not controlling here because the knowledge standard for state law aiding and abetting fraud claims is both different and more exacting than the knowledge standard applicable to CEA aiding and abetting claims. *See Fintec Grp., Inc. v. U.S. Bank, N.A.*, 2014 WL 4784141, at *7 (N.D. Ill. Sept. 25, 2014).

5416380, at *6 (S.D.N.Y. Dec. 18, 2008), *aff'd* 349 F. App'x 637, 639 (2d Cir. 2009) ("Even if [defendant] had reason to suspect that [the principal] was laundering money, this does not mean that [defendant] had actual knowledge of the fraudulent scheme perpetrated by [the principal].").

Here, Plaintiffs fail to allege plausibly that any Defendant had actual knowledge that any other Defendant was engaged in the underlying fraud that Plaintiffs allege caused their injuries. At most, Plaintiffs allege that, during the financial crisis, some Defendants suspected that some other Defendants were suppressing their USD LIBOR submissions to protect their own market reputations.[113] Moreover, no Plaintiff alleges plausibly that any Defendant had actual knowledge of, or knew of its "role" within, a fraudulent scheme by any other Defendant to suppress its USD LIBOR submissions in an effort to defraud counterparties and thereby profit from USD LIBOR-based financial instruments.[114]

B. Plaintiffs Fail to Plead That Any Defendant Provided "Substantial Assistance" In Furtherance of Another's Fraud

To plausibly allege "substantial assistance" in furtherance of a principal's fraud, Plaintiffs must show (1) an affirmative act (such as a "direct communication") by a Defendant that (2) proximately caused Plaintiffs' alleged harm.[115] Where, as here, Plaintiffs fail to adequately

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[113] *See, e.g.*, BATA ¶ 134 (Barclays traders "***believed*** . . . that other Contributor Panel banks were submitting unrealistically low Dollar LIBORs") (emphasis added); *id.* ¶ 137 ("Barclays ***believed*** that the submissions of other contributing banks were inappropriate during the financial crisis.") (emphasis added); *id* ¶ 143 (Barclays submitter "was ***worried*** that the Contributor Panel banks' submissions . . . were false and dishonest") (emphasis added).

[114] *See Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 293 (2d Cir. 2006) (affirming dismissal of an aiding and abetting claim because banks' knowledge that an attorney "engaged in improper conduct that would warrant discipline by the Appellate Division" did not show "actual knowledge of his outright looting of client funds").

[115] *See, e.g.*, *Filler v. Hanvit Bank*, 2003 WL 22110773, at *2 (S.D.N.Y. Sept. 12, 2003); *ARB, Inc. v. Luz Constr., Inc.*, 1992 WL 164487, at *3 (9th Cir. July 16, 1992); *Dow Chem.*, 970 P.2d at 112-13.

allege Defendants had a statutory or fiduciary duty to disclose, mere nondisclosure does not amount to substantial assistance.[116]

Plaintiffs do not adequately allege that any Defendant substantially assisted any other Defendant in suppressing USD LIBOR. The Complaints cite no direct communications between Defendants regarding the suppression of USD LIBOR, and otherwise fail to allege any affirmative acts between Defendants that proximately caused Plaintiffs' alleged harm. In addition, certain Plaintiffs allege that some Defendants reported to regulators their suspicions that other Defendants were making inaccurately low USD LIBOR submissions.[117] That allegation undercuts Plaintiffs' aiding and abetting claims, because such reports would harm—not help—other Defendants' attempts to suppress USD LIBOR.

IV. PLAINTIFFS' ALLEGATIONS OF CONSPIRACY FAIL

The BATA, Darby, FDIC, Fannie Mae, Houston, Philadelphia, Prudential, Regents, Salix, Schwab, and Triaxx Plaintiffs allege "civil conspiracy" claims. Although the elements of civil conspiracy vary by jurisdiction, each relevant jurisdiction requires plaintiffs to allege: (1) an underlying tort or wrongful act, and (2) an agreement.[118] Plaintiffs' conspiracy claims

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[116] *See, e.g.*, *ARB, Inc.*, 1992 WL 164487, at *3-4 ("[A] mere failure to disclose cannot be the basis for liability unless the party failing to disclose owes a fiduciary or statutory duty of disclosure."); *Albion Alliance Mezzanine Fund, L.P. v. State St. Bank & Trust Co.*, 797 N.Y.S.2d 699, 705 (N.Y. Sup. Ct. 2003).

[117] *See, e.g.*, FDIC ¶¶ 89, 92; BATA ¶ 141; Houston ¶ 119; Fannie Mae ¶¶ 54, 57, 58.

[118] *See*, *e.g.*, *Ex parte Alamo Title Co.*, 128 So. 3d 700, 713 (Ala. 2013); *Prakashpalan v. Engstrom, Lipscomb & Lack*, 167 Cal. Rptr. 3d 832, 858 (Cal. Ct. App. 2014); *Harris v. AmeriGas Propane, Inc.*, 2012 WL 7051302, at *6 (D. Colo. Dec. 5, 2012), *report and recommendation adopted*, 2013 WL 500739 (Feb. 11, 2013); *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 738 (D.C. 2000); *Sunoptic Techs., LLC v. Integra Luxtec, Inc.*, 2009 WL 722320, at *5 (M.D. Fla. Mar. 18, 2009); *Bolinger v. First Multiple Listing Serv.*, 838 F. Supp. 2d 1340, 1368 (N.D. Ga. 2012); *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 938-39 (7th Cir. 2012) (Illinois law); *Sims v. Beamer*, 757 N.E.2d 1021, 1026 (Ind. Ct. App. 2001); *Kirk v. NCI Leasing, Inc.*, 2009 WL 112824, at *6 (Kan. Ct. App. Jan. 16, 2009); *Ashby v. State*, 779 N.W.2d 343, 357 (Neb. 2010); *Morris v. Bank of Am. Nev.*, 886 P.2d 454, 455 n.1 (Nev. 1994); *Cain v. Champion Window Co.*, 164 P.3d 90, 98 (N.M. Ct. App. 2007); *G.D. v. Kenny*, 15 A.3d 300, 321 (N.J. 2011); *Farina v. Bastianich*, 2012 WL 10785204, at *12 (N.Y. Sup. Ct. Sept. 28, 2012), *aff'd as modified on other grounds*, 984 N.Y.S.2d 46 (App. Div. 2014); *Advanced Coatings Int'l, Inc. v. Fla. CirTech, Inc.*, 2012 WL 3067375, at *3 (N.D. Ohio July 27, 2012); *Goldstein v. Phillip Morris,*

(continued . . .)

should be dismissed because Plaintiffs fail to allege facts sufficient to satisfy Rule 9(b)'s heightened pleading standard with respect to either element. *See Filler v. Hanvit Bank*, 2003 WL 22110773, at *2-3 (S.D.N.Y. Sept. 12, 2003). Plaintiffs' allegations of an "agreement" are also inadequately alleged for the reasons set forth in Defendants' prior memoranda of law regarding antitrust claims. [ECF No. 166].

V. PLAINTIFFS' NEGLIGENT MISREPRESENTATION CLAIMS FAIL

Although the elements may be formulated differently depending on the particular jurisdiction, the essential elements of negligent misrepresentation are that (1) defendant, owing a duty to plaintiff, negligently supplied plaintiff with false information,[119] (2) plaintiff actually and justifiably relied on the information, and (3) plaintiff sustained a loss proximately caused by its reliance.[120] For the same reasons asserted against Plaintiffs' fraud claims, the negligent misrepresentation claims fail because Plaintiffs do not adequately plead one or more elements, including falsity, reliance and damages. Plaintiffs' negligent misrepresentation claims also fail for the additional reason that Defendants did not owe a duty of care to Plaintiffs.[121]

(. . . continued)
Inc., 854 A.2d 585, 590 (Pa. Super. Ct. 2004); *Apani Sw., Inc. v. Coca-Cola Enters.*, 300 F.3d 620, 635 (5th Cir. 2002) (Texas law); *Boy 7 v. Boy Scouts of Am.*, 2011 WL 2415768, at *4 (E.D. Wash. June 13, 2011).

[119] Under California law, for example, a claim for negligent misrepresentation must flow from an assertion of material fact. "An omission or implied assertion or representation is not sufficient." *Trans Pac. Nat'l Bank v. UBS AG*, 2010 WL 2354165, at *4 (N.D. Cal. June 9, 2010); *see also Wilson v. Household Fin. Corp.*, 2013 WL 1310589, at *4 (E.D. Cal. Mar. 28, 2013).

[120] *See, e.g.*, *Friedman v. Merck & Co.*, 131 Cal. Rptr. 2d 885, 900 (Cal. Ct. App. 2003); *City of Prattville v. Post*, 831 So. 2d 622, 628 (Ala. Civ. App. 2002); *Linville v. Ginn Real Estate Co., LLC*, 697 F. Supp. 2d 1302, 1307 (M.D. Fla. 2010); *Next Century Commc'ns Corp. v. Ellis*, 318 F.3d 1023, 1030 (11th Cir. 2003) (Georgia law); *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 843 N.E.2d 327, 332 (Ill. 2006); *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1387 (Nev. 1998); *New York Pipeline Mech. Contractors, LLC v. Sabema Plumbing & Heating Co.*, 2012 WL 209349, at *4 (D.N.J. Jan. 24, 2012); *Healthsource, Inc. v. X-Ray Assocs. of N.M., P.C.*, 116 P.3d 861, 870 (N.M. Ct. App. 2005); *Pasacic v. Ameriquest Mortg. Co.*, 2005 WL 1200373, at *8 (N.D. Ohio May 19, 2005).

[121] Plaintiffs' negligent misrepresentation claims against Contracting Defendants also fail because they duplicate Plaintiffs' breach of contract claims. *See, e.g.*, *R.H. Damon & Co. v. Softkey Software Prods., Inc.*, 811 F. Supp. 986, 992-93 (S.D.N.Y. 1993) (dismissing negligent misrepresentation and fraud claims as redundant because no extra-contractual facts were alleged).

Claims for negligent misrepresentation cannot stand against Non-Transacting Defendants.[122] Many relevant jurisdictions follow Section 552 of the Restatement (Second) of Torts, which provides that liability "is limited to loss suffered" by a "limited group of persons for whose benefit and guidance [defendant] intends to supply [false] information."[123] Restatement (Second) of Torts § 552(2).[124] In applying the Restatement, courts have recognized that the "extensive, faceless, and indeterminable investing public-at-large" is not a limited class.[125] Accordingly, Plaintiffs cannot state a claim against Non-Transacting Defendants in jurisdictions that follow the Restatement. Plaintiffs' claims fail for similar reasons in other jurisdictions that apply the narrower requirement that a defendant be in a "special relationship of trust or confidence" with the plaintiff.[126] Indeed, contrary to Plaintiffs' allegations,[127] Defendants did

[122] *See, e.g.*, FDIC ¶ 321; Houston ¶ 472; Prudential ¶ 525; Regents ¶ 583; Triaxx ¶ 189.

[123] *See, e.g.*, *Amana Soc'y, Inc. v. GHD, Inc.*, 758 F.3d 954, 958 (8th Cir. 2014) (Iowa law); *Mosley v. Wyeth, Inc.*, 719 F. Supp. 2d 1340, 1345 (S.D. Ala. 2010); *Robinson v. OppenheimerFunds, Inc.*, 2013 WL 754417, at *5 (D. Colo. Feb. 27, 2013); *FLA Orthopedics, Inc. v. Am. Ins. Co.*, 896 So. 2d 1, 3 (Fla. Dist. Ct. App. 2004); *Thomas v. Lewis Eng'g, Inc.*, 848 N.E.2d 758, 760 (Ind. Ct. App. 2006); *Long Motor Corp. v. SM&P Util. Res., Inc.*, 2009 WL 2595932, at *3 (Kan. Ct. App. Aug. 21, 2009); *Abrahamson v. First Nat'l Bank of Holdrege*, 2006 WL 277109, at *8 (D. Neb. Feb. 3, 2006); *Barmettler*, 956 P.2d at 1387; *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 750 P.2d 118, 122 (N.M. 1988); *Gutter v. Dow Jones, Inc.*, 490 N.E.2d 898, 900 (Ohio 1986); *Collins v. Morgan Stanley Dean Witter*, 60 F. Supp. 2d 614, 618 (S.D. Tex. 1999), *aff'd,* 224 F.3d 496 (5th Cir. 2000); *Good Samaritan Hosp. v. Lexington Ins.*, 2012 WL 934238, at *2 (W.D. Wash. Mar. 20, 2012).

[124] New Jersey law is "essentially the same" as that of jurisdictions which have adopted Section 552. *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 2005 WL 147061, at *9 (D.N.J. Jan. 13, 2005). In particular, plaintiffs must be of an "identifiable class with respect to whom defendant knows or has reason to know are likely to suffer such damages from its conduct." *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 116 (N.J. 1985). Here, while Plaintiffs as "members of the general [investing] public" may have been a "foreseeable class of plaintiffs," "their presence within the area [of injury] would be fortuitous, and the particular type of economic injury . . . hopelessly unpredictable and not realistically foreseeable." *Id.*

[125] *Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC*, 700 F.3d 829, 840 (6th Cir. 2012) (New York and Ohio law); *see also Thomas*, 848 N.E.2d at 760; *Pahre v. Auditor of State*, 422 N.W.2d 178, 180 (Iowa 1988); *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 920-21 (Tex. 2010); *In re Crazy Eddie Sec. Litig.*, 812 F. Supp. 338, 360 (E.D.N.Y. 1993) (Texas law).

[126] *See Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 819 F. Supp. 1282, 1293 (S.D.N.Y. 1993); *see also J.A.O. Acquisition Corp. v. Stavitsky*, 863 N.E.2d 585, 587 (N.Y. 2007); *Mandarin Trading Ltd. v. Wildenstein*, 944 N.E.2d 1104, 1109 (N.Y. 2011). California and Ohio also impose a special relationship requirement. *See, e.g.*, *Minkler v. Apple, Inc.*, 2014 WL 4100613, at *6 (N.D. Cal. Aug. 20, 2014); *Ohio Police & Fire Pension Fund*, 700 F.3d at 840.

[127] *See, e.g.*, Houston ¶ 474; Principal Fin. ¶¶ 243-44; Principal Funds ¶¶ 241-42.

not have the kind of "exclusive" or "superior" knowledge that could potentially give rise to such a relationship. (*See supra* Section II.B.2.) Regardless, the law recognizes that there is no cause of action for negligent misrepresentation where "all of the statements which Plaintiffs allege were misleading were made in routine SEC filings, press releases, or shareholder reports," *In re Caere Corp. Sec. Litig*., 837 F. Supp. 1054, 1062 (N.D. Cal. 1993)—public statements that, like LIBOR submissions, are not directed to any limited group of persons. Accordingly, negligent misrepresentation claims against Non-Transacting Defendants fail as a matter of law.

Nor can Plaintiffs assert such claims against Contracting Defendants.[128] Several jurisdictions that have adopted the Restatement do not recognize claims for negligent misrepresentation arising from the performance or negotiation of a contract.[129] In states that require a special relationship, these claims similarly fail because an arm's-length business relationship is not considered "the sort of confidential or fiduciary relationship that would support a cause of action for negligent misrepresentation."[130] Moreover, the express disclaimer of reliance in the ISDA agreement (*see, e.g.*, FDIC Ex. 31, Schedule, Part 5(e)) "negated any 'special relationship' for the purposes of establishing a claim for negligent misrepresentation." *Abu Dhabi Commercial Bank v. Morgan Stanley & Co., Inc*., 2013 WL 837536, at *5 (S.D.N.Y. Mar. 6, 2013).

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[128] *See, e.g.*, FDIC ¶ 320; Houston ¶ 473; Principal Fin. ¶ 242; Principal Funds ¶ 240; Prudential ¶ 524; Regents ¶ 584.

[129] *See, e.g.*, *Westmont Dev. Grp., LLC v. Twp. of Haddon*, 625 F. Supp. 2d 178, 198 (D.N.J. 2009) ("a negligent misrepresentation claim is not cognizable as between commercial parties engaged in a direct contractual relationship resulting from arms-length negotiations"); *Truck Components Inc. v. Beatrice Co*., 1994 WL 520939, at *9 (N.D. Ill. Sept. 21, 1994); *Samaron Corp. v. United of Omaha Life Ins. Co.*, 2014 WL 4906314, at *12 (N.D. Ind. Sept. 29, 2014); *Universal Contracting Corp. v. Aug*, 2004-Ohio-7133, at ¶ 18 (Ohio Ct. App. 2004); *DeFranceschi v. Wells Fargo Bank, N.A.*, 837 F. Supp. 2d 616, 625-26 (N.D. Tex. 2011); *Bybee Farms, LLC v. Snake River Sugar Co.*, 625 F. Supp. 2d 1073, 1080 n.7 (E.D. Wash. 2007).

[130] *Greentech Research LLC v. Wissman*, 961 N.Y.S.2d 406, 407 (App. Div. 2013); *see also United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1187 (C.D. Cal. 2009); *In re Par Pharm., Inc. Sec. Litig.*, 733 F. Supp. 668, 686 (S.D.N.Y. 1990).

Also deficient are Plaintiffs' claims of alleged securities purchases in reliance on representations regarding LIBOR-linked interest payments in offering documents provided by Transacting Defendants. (*See* Prudential ¶ 525; Triaxx ¶¶ 155(E), 191.) For example, New Jersey law, applying Restatement principles, requires a plaintiff to allege that the defendant "made the alleged assurances for [plaintiff's] 'benefit and guidance.'" *Commerce Bancorp, Inc. v. BK Int'l Ins. Brokers, Ltd.*, 490 F. Supp. 2d 556, 564 (D.N.J. 2007). By contrast, where, as here, Plaintiffs plead that Defendants "made the assurances to further [their] own interests, to the detriment of [Plaintiffs]," the "negligent misrepresentation claim must fail as a matter of law."[131] *Id*. Under New York law, which requires a plaintiff to allege a "special relationship," purchasers of securities are not in any special or fiduciary relationship with financial institutions involved in underwriting, issuing or securitizing the securities. *See, e.g.*, *Phoenix Light SF Ltd. v. Goldman Sachs Group, Inc.*, 2014 WL 2650534, at *7 (N.Y. Sup. Ct. June 13, 2014). The same reasoning applies with even greater force to Plaintiffs' claims asserted against panel bank Defendants (*see* Prudential ¶ 524) when legally distinct non-panel Transacting Defendants were the entities involved with the securitization process.[132]

CONCLUSION

For the forgoing reasons, the fraud claims, aiding and abetting fraud, conspiracy to commit fraud, and negligent misrepresentation claims asserted in the Fraud Actions should be dismissed with prejudice.

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[131] *See* Prudential ¶ 8 ("Defendants . . . exploited their control over Libor for their own benefit."); ¶ 474 ("Defendants . . . qualify as offerors or sellers of the securities on the Exhibits because they issued, marketed, or sold the securities to Plaintiff and other members of the public for their own financial benefit."); ¶ 480 ("Defendants made these misrepresentations and omissions with the purpose and intent of benefiting themselves.").

[132] *See, e.g.*, *In re Investors Warranty of Am., Inc. v. B.W.E. Dev., L.L.C.*, 2010 WL 2557559, at *4 (D.N.J. 2010); *Plaintiffs' State & Sec. Law Settlement Class Counsel Entwistle & Cappucci LLP v. Bank of N.Y. Mellon*, 985 N.Y.S.2d 398, 409 (N.Y. Sup. Ct. 2014); *Defer LP v. Raymond James Fin., Inc.*, 654 F. Supp. 2d 204, 218-19 (S.D.N.Y. 2009).

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